THE LEGAL ANALYST

A Peer-Reviewed Law Journal

Vol.: XI No. 1 & 2 **ISSN: 2231-5594** **Year: 2021**

Cite this issue as: *The Legal Analyst*, Vol. XI No. 1 & 2 (2021)
Website: https://sites.google.com/view/the-legal-analyst/

Published By
Banaras Law Publications
Ashapur-Sarnath
VARANASI – 221007

'The Legal Analyst' is a bi-annual peer-reviewed Law journal focusing on multi-faceted socio-legal issues/problems. This Journal is published in the month of June and December in a year but due to Covid-19 pandemic both the issues of 2021 are printed jointly.

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ISSN: 2231-5594

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Printed and published by Mr. Prabhash Pandey for *Banaras Law Publications*, VARANASI-221007(U.P. -INDIA)

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HEALTH CARE POLICY MANAGEMENT IN THE PANDEMIC INDIAN SOCIETY AND THE ROLE OF JUDICIARY

Dr. T.S.N. Sastry* & Ms. Tamma Medha**

***Abstract*:** Health Care Policy Management is one of the important objectives of Indian Government. After Independence following the Bore Committee recommendations the State at regular intervals adopted Health Policies. Several steps have been initiated including liberal and good budgetary allocation is promised by the Health policy of 2017. However, the Covid19 crisis had brought in critical impact on India's overall health care policy management *vis-a-vis* providing Life security to all citizens. The paper subtly examines the Health Care Policy management in India and the pragmatic approaches that may be adopted to meet exigencies as well general health care in future in tune with recent directions rendered by the apex court.

***Keywords*:** Covid-19; Health Care Policy; India; Pandemic; Health for All.

Introduction:

Health Care Policy Management is one of the fundamental objectives of a State for the all-round development of society. In tune with the ethical, social and legal objectives, in the Indian scenario, apart from States in their respective jurisdictions, the Union of India through the Ministry of Health and Family welfare looks after health care policies and Management. In spite of health care policies are adopted to do the best of their ability by Union and States to meet the health needs of populace of the country, more so in pandemic situations, especially, the second wave of COVID-19 had exposed the shortfall on the limited health facilities available in the country more so on the public health care system. The situation and the steps taken with social combative measures have had an alarming impact on the socio-economic well-being of people and had dented earlier policy parameters, calls for to evolve pragmatic approaches in the health care policy management of the country.[1] Apart from the above, conflicting interests of the Union and States have had further impact on the cooperative federalist principles of constitution, which led the Supreme Court to intervene to guide the Union and States to discharge their constitutional and ethico-legal role in the handing health care policy management to meet out pandemic situations and to evolve policy framework of the State.

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[1]Akanksha Upadhyay, COVID-19: A comprehensive timeline of Coronavirus pandemic in India, Times Now. News.com, 16 April 2020 , https://www.timesnownews.com/india/article/covid-19-a-comprehensive-timeline-of-coronavirus-pandemic-in-india/579026 (accessed on January 2021)

Definition of Health Care Policy Management:

Health care policy management connotes a wider perspective than common general perception of prevent, treatment and management of health. Health care as a basic human need across cultures, population requires medical and clinical assistance for the well-being of individuals in societies and steps have to be taken for disease prevention. [2] According to World Health Organization, health care embraces all the goods and services designated to promote health including "preventive, curative and palliative interventions, whether directed to individuals or populations." [3] Health care policy management comprehensively covers the role of states to meet the goals of health at local, regional, national, sub-regional and international levels in the adoption of policies and actions undertaken to achieve the objectives for mid and long term priorities including the facilities that are provided to people with a cooperative legal framework.[4]

Health Care Policy Management is a comprehensive perspective describes the evaluation on the role of the state, the relationship between the state and society, the reactions to health conditions and their determinants by the population, through proposals and priorities for public action. It also includes the study of its relationship to economic and social policies, social control, health economy and financing.[5] The definitional perspective denotes that health care policy management is an amalgamation of the rights and duties of states both locally and internationally to cooperate with each other to augment a better living standard of world population at all times, particularly in pandemic situations nation-states have to join together without prejudice to narrow perspectives of confining themselves to national territories and their population.

There is no direct treaty or convention that mandates international community to work in tandem to evolve uniform policy perspectives for health care policy management in international law, but the various texts adopted by multilateral institutions are legally binding in sharing resources, especially, during communicable diseases to develop the standards of global health care

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[2] Blog University of North Dakota What Is Health Policy and What Role Does It Play in Nursing? https://onlinedegrees.und.edu/blog/what-is-health-policy/ (visited in April 2021)

[3] A. Sheeba and A. Seilan: Health Care System in India: An over View, International issues on Health Economics and Management Publisher: 2020,TISSL International Publications, New Delhi, pp 215-18

[4] WHO, Regional Office for Europe, https://www.euro.who.int/en/health-topics/health-policy (accessed in Jan 2021)

[5] Levcovitz E, Baptista TWF, Uchôa SAC, Nesploli G, Mariani M. Produção de conhecimentoempolítica,planejamento e gestãoemsaúde e políticas de saúde no Brasil (1974-2000). Brasília (DF): OPAS; 2003. p.74. [SérieTécnicaProjeto de Desenvolvimento de Sistemas de Serviços de Saúde, 2] cited in Jairnilson Silva Paim Carmen Fontes Teixeira, Policy, planning and health management: the current understanding, Rev SaúdePública 2006;40(N Esp)., p3 https://www.scielo.br/j/rsp/a/T59CdBgDQyGf3hqLpZCjyks/?lang=en&format=pdf (visited in May 2021)

policy management. [6] The much discussed Trade Related Intellectual Property Rights (TRIPS) through Art. 7 authorizes the states to balance their rights and obligations in the promotion, protection, sharing of research and scientific data and other aspects, especially, to Patents, Designs, Trade Marks and other ownership rights in pandemic situations is an exception.

In the international plane though there are no direct regulations or conventions to deal with health care and health care policy management, the "trans-nationalization" of infectious diseases across geopolitical boundaries during the European cholera epidemics of 1830 and 1847 catalyzed the evolution of earliest multilateral governance of communicable diseases. Accordingly, since the first Sanitary Conference conducted by France in 1851 to deal with the communicable diseases, the system of Health care Policy Management and the legal obligations of states has evolved gradually. From then onwards thirteen sanitary conventions were adopted in different periods, which led for the evolution of WHO. After its establishment, the WHO in 1951 framed International Sanitary regulations codifying the previous conventions. [7] These regulations were later renamed as International Health Regulations in 1969, which were briefly modified in 1979 and 1981. [8] Since then the WHO is regularly adopting the IHR regulations. The latest regulations adopted in 2020 after the COVID-19 spread across the World.

Definition of Pandemic:

There is no comprehensive description to describe Pandemic and the elements relating to it. According to WHO "An influenza virus to which acquires the ability to cause sustained human-to human transmission leading to community-wide outbreaks. Such a virus has the potential to spread rapidly worldwide, causing a pandemic." [9] According to IHR a pandemic is as "an extraordinary event which is determined…(i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response."[10]

The above definitions amply cover any type of epidemic that spreads across the World which includes the latest syndrome of COVID 19. Accordingly, the diverse principles of international law impose obligations on the states to cooperate and coordinate amongst themselves in all ways and means to protect public health and well-being of people.

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[6]Obiji Aginam, International Law and Communicable Diseases, Bulletin of World Health Organization, 2002, 80 (12), https://www.who.int/bulletin/archives/80(12)946.pdf?ua=1 (visited in April 2021)

[7]Gostin, L. O., & Katz, R. (2016). The International Health Regulations: The Governing Framework for Global Health Security. *The Milbank quarterly*, *94*(2), 264–313 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4911720/ last visited on 15.5.2021

[8]Aginam O. International law and communicable diseases. Bull World Health Organ. 2002;80(12):946-51. E pub 2003 Jan 23. PMID: 12571722; PMCID: PMC2567710.

[9]WHO, *Pandemic Influenza Risk Management*, WHO/WHE/IHM/GIP/2017.1 at 26 (May 2017, also see https://www.ncbi.nlm.nih.gov/books/NBK143062/pdf/Bookshelf_NBK143062.pdf

[10] WHO Health Regulations 2005 Introduction and Art 12

Apart from the above, in the absence of a vaccine or medicine to prevent or cure the influenza, a number of associated health issues and regulations pushed people to stay in indoors to stop the spread of the disease has a severe impact to exercise freely their guaranteed human rights. The Quarantine Policy has affected and changed human lives in many ways and means. The initial few months of quarantine was quite happy time for humans as well for the human body. Human body needs rest from time to time as it allows the muscles to rebuild and grow. The body's energy store also gets replenished which is the glycogen. Glycogen is present in the muscles. Quarantine has helped the body to gain a lot of glycogen stores as well as mental break to the human race.

While staying indoors might have helped to shield us from the pandemic, missing out on time outdoors might alter our risk of catching diseases in other ways. Stepping out only for essentials and the remaining time staying in the home is equally dangerous to the human body. Lifestyle of people have changed by spending more time indoors which led to use greater amounts of sunscreen which can be responsible for lower amounts of vitamin D.

One of the foremost obvious cases of usual generation of vitamin D within the sun in reaction to UVB exposure was missed during the strict adherence to quarantine. This everyday measurement of vitamin D can offer assistance to reinforce our bones and teeth, but it moreover has an impact on our immune cells.

Vitamin D empowers the macrophages in our lungs-first line defense against respiratory diseases- to regurgitate out an antimicrobial peptide called cathelicidin, killing bacteria and viruses directly. It changes the action of other resistant cells such as B and T cells, which organize longer term reactions. Individuals with low levels of vitamin D are at more prominent chance of viral respiratory tract disease such as flu etc.

Vitamin D is a hormone that is created in the human body when it is exposed in the sunlight. Without proper amount of vitamin D one can develop health problems like weakened bones (also called as osteomalacia) and cardiovascular diseases etc. Children with low vitamin D are at higher risk of developing rickets.

Being at home for a longer time without stepping outside can drive a person crazy. Sunlight is mandatory and a must resource for humans. It helps in lowering the blood pressure, preventing diseases, helps in taking in certain minerals like calcium and phosphorus and also promotes good mental health. Low levels of vitamin D have been linked to depression and is also associated with higher risks of seasonal pattern (SAD= seasonal affective disorder). Also called as 'winter blues'

Sunlight produces two main hormones: serotonin and melatonin. These two hormones regulate the sleep cycle. Serotonin helps in waking up and melatonin helps to sleep. Lack of sunlight triggers the brain to produce more of

these hormones which throws off the sleep-wake cycle. This cycle plays crucial role in our health and wellness. Having a balanced sleep to boost our well-being

Health Policies and India:

Health is defined as a state of complete physical, mental and social well being and just not the non existence of disease or ailment. Health is recognized as a human right internationally and as a fundamental right by the constitutions. The International Covenant on Economic and Social Rights through Art.12 broadly defines health in a broad perspective which includes treatment and control of epidemic, endemic and other diseases. The Health Regulations of WHO provides for an overarching legal framework that defines the rights and obligations of countries in handing public health and emergencies that have a potential to cross borders. [11] The same was assured and guaranteed to the people of India through constitution by way of Fundamental Rights and Directive Principles of States Policy.

Health Policy is a comprehensive term which includes health management and directs the state to adopt directives, plans and programs continuously at all times not only in Pandemic Situation but at regular intervals and to develop the facilities continuously. [12] However, in a pandemic, health care policy management calls for the extensive role of the state to act swiftly to protect human lives, its relations with individuals and society at the grass roots level to meet the exigencies during and after the Pandemics.

The efforts of the Union and States after independence have brought in better health care system in the country as mandated by various provisions of the constitution of India. [13] The health policies of the country in the initial periods were developed on two broad principles: i) that none should be denied healthcare for want of ability to pay, and (ii) that it was the responsibility of the state to provide healthcare to people. [14] The 1983 and 2002 Health policies guided the Union and States in augmenting health care in the country including permitting the establishment of Private sector to share the responsibility. However the 2017 National Health policy aims to reach in a comprehensive integrated way to move towards wellness of everyone. The policy envisages health to all without any hardships with an aim to orient all policies to attain

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[11] WHO Health Regulations 2005 https://www.who.int/health-topics/international-health-regulations#tab=tab_1

[12] Jairnilson Silva Paim Carmen Fontes Teixeira, Policy, planning and health management: the current Understanding, Rev Saúde Pública 2006;40, https://www.scielo.br/j/rsp/a/T59CdBgDQyGf3hqLpZCjyks/?lang=en&format=pdf last visited on 15.5.2021

[13] Apart from the directive principles of State Policy, the Union, State and Concurrent lists and Article 243 G et.all deals with right to health. However, the SC in the absence of a direct Fundamental right to health In Bandhua Mukti Morcha v. Union of India & Others, 1984 AIR 802, 1984 SCR (2) 67 declared it as a constituent part of Art 21

[14]A. Sheeba & A. Seilan Health Care System in India : An Overview, International issues on Health Economics and Management,(Arulraj (ed) TISSL International Publications, New Delhi, 2010, PP 215-18, https://www.researchgate.net/publication/340085233 visited on 176.2020

the goal. The policy lay stress on five important objectives: 1) Health Status and Programme Impact; 2) Health Systems Performance; 3) Health Systems strengthening; 4) Policy thrust and 5) Legal Framework for Health Care and Health Pathway. The policy aims to amend the constitution and to guarantee health rights as fundamental rights on the lines of right to education. Apart from the above objectives, the chief objective of it is to increase the GDP spending on health care from the current 1.15% to 2.25% by 2025 to expand the health infrastructure, such as doctors, paramedics, hospitals, research, and development, etc.[15]

Covid-19 and the Health Care Management:

Corona virus is known to the world since 1930 as a mild disease, which causes respiratory and gastrointestinal problem amongst the infected patients and there was no life danger. However, the novel Corona virus is a new strain with distinct in its structure brought in pandemic situation as identified by the Wuhan lab in China. The WHO titled it as COVID-19 on Feb 11, 2020 is dangerous and as airborne it transmits quickly from person to person. The rapid transmission of the virus has not only resulted in constituting it as a pandemic but exposed the global realities of health care system and well that of India.[16]

The health expenditure in India is stood at 1.29% as compared with that of the spending of USA 8.6%, Brazil 4% and China 2.9%. In view of low spending on health sector, the private sector has predominantly occupied a higher stake in the health care which is highly expensive and caters to the needs of those who could afford to meet its cost. The government sector though affordable on the other hand, but lack of modern facilities and doesn't have the capacity to serve the more than a billion populations due to scare financial support. In reality, India has a total of 43,486 private hospitals, 1.18 million beds, 59,264 ICUs, and 29,631 ventilators in the government sector, On the other hand, in the private sector there are 25,778 public hospitals, 713,986 beds, 35,700 ICUs, and 17,850 ventilators. The private infrastructure accounts for nearly 62% of India's entire health infrastructure.[17]

In spite of lack of facilities, the leadership of the nation under the able leadership of the Prime Minister of the country, the health workers, and public sector did a decent job. The role played by the health workers received

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[15] National Health Policy, 2017, Ministry of Health and Family Welfare Govt of India;.Priya Gutamet. all, Public Health Policy of India and COVID-19: Diagnosis and Prognosis of the Combating Response Sustainability 2021, 13, 3415. https://doi.org/10.3390/ su13063415; also see https://vikaspedia.in/health/nrhm/national-health-policies/national-health-policy-2017

[16] H paramesh, The COVID-19 pandemic: a dynamic infection with unpredicted public health emergency of the decade, Editorial, Current Science, vol.120 No .10, 25.5.2021 p.1547

[17] Christophe Jaffrelot: Private Healthcare in India: Boons and Banes; ARTICLES - 3 NOVEMBER 2020, https://www.institutmontaigne.org/en/blog/private-healthcare-india-boons-and-banes, visited on 15.5.2021

appreciation by all sections of the polity including the judiciary. The state and the health workers saved the lives of many and reduced the death rate compared to many of the developed countries in the world.

The second wave and its affects were much more severe than compared to the First wave. The Higher infectivity, doubling time of seven days compared to one month during the first wave, faster rate of spreading, infection among younger people and earlier onset of lung damage leading to a greater demand for oxygen and ventilators, increase in the number of deaths under difficult conditions increase in the number of deaths under difficult conditions and crippled the health care and exposed the incapacity of the health sector of the country.[18] Apart from the above, the low amount of GDP expenditure spent on health, the jittery blame game for political dynamics, non-cooperative tactics of some sates and Union Territories with the Union in contrast to the cooperative federalist principles of the Constitution and fast spread of the disease, chaotic conditions, led the Judiciary to take the lead to monitor the executive role to standby the side of people in crisis.

Role of Judiciary:

As the second wave of Covid-19 was severe and the non-preparedness of the Union and states, and no clear cut plan of the state to meet the crisis, non-availability of ventilators, different pricing system for the vaccine produced by different companies, the exploitative tactics of private health care institutions and hospitals, the apex court was forced to step in to check the policy of the state and to maintain constitutional stability.[19] The apex court basing on news reports and the prevailed situation in the country set five important questions to address in its *suo motto* petition. Firstly, what made the state to arrive at a decision that procurement of rare commodity in a decentralized fashion as the best policy instead of mass rapid inoculation? Secondly, was there any finalized policy in the distribution of vaccine to all as right to health is a part of the guaranteed right to health under Article 21 of the Constitution? Thirdly, whether the state had taken into consideration of the socio-economic inequality of the people into consideration while shifting the burden of cost on to them to buy the vaccine? Fourthly, what made the Union of India not to exercise the powers under Sections 92[20] and 100[21] of the Patents Act in the crisis of emergent situation to increase the production of vaccine and drugs by the companies? Lastly, what was the policy framework of the Government in extending support

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[18] *Supra note* 16.

[19] In Re: Distribution of Essential Supplies and Services during Pandemic, Suo Motu Writ Petition (Civil) No.3 of 2021

[20] Section 92 authorises the central government through a gazette notification to issue a compulsory license at any time after the grant of the patent in the case of:

- a national emergency;
- circumstances of extreme urgency; or
- public non-commercial use

[21] This section authorizes the Union of India to use the inventions for purpose of Government under various conditions as specified in the section.

and help to the bereaved families of health care personnel who fought against the Corona war in treating the victims of Covid-19?

The Union, States and the Union Territories filed different affidavits explaining the steps taken and the future plan of action. The Court after regular monitoring of the situation gave directions to the Union and as well to the states and Union Territories and directed them to file a detailed affidavit for further adjudication of the matter. Amongst the various directions, first, the Union was directed to fill the deficit in the supply of oxygen to the GNTCD on or before the midnight of May 3, 2021; secondly, the union in collaboration with the states had to prepared a buffer stock of oxygen for emergency purposes and decentralize the location of the stock and emergency stocks had to be created in around four days time. Thirdly, The Union and States were directed to stop all kinds of victimization on information on social media or harassment caused to individuals seeking/delivering help on any platform will attract a coercive exercise of jurisdiction by this Court. Failing which would be considered under the coercive exercise of jurisdiction of the court. Fourthly, the Union of India was directed to frame a National Policy on an urgent basis with respect to admission of people to hospitals and the health care policy management. During the pendency of policy formulation, no person denied the right to hospitalization or drugs even in the absence of any identity proof. Lastly, the Union was directed to revisit its policies, especially, with respect to the availability of oxygen, availability and pricing of vaccine, other essential drugs at affordable prices including on all other aspects and directed the state to file a detailed affidavit on the steps initiated and the implementation process on or before May 10, 2021.

The Union of India on May 9, 2021 filed a detailed affidavit on all the points directed by the apex court with annexure as per the orders of the Court. The detailed affidavit enlists framework, the additional steps taken in the augmentation of fundamental rights of the citizens.[22]

Conclusion:

The Covid-19 crisis has had its impact on every sector including health care policy management across the world including India. The NHP 2017 though incorporated laudable objectives to meet the millennium development goals of the UN, it can't be achieved until the Union and States increase the budgetary allocation, the infrastructural and managerial policies to promote health rights. The COVID crisis should be an eye opener to expand the doctor patient ratio including the capacity of beds, ICUS and other health facilities. To comprehensively achieve the objective of Health for All of NHP 2017, the budgetary sanction needs to be increased at least two folds than the present expenditure and has to be allocated on priority basis than to wait till 2025 in a gradual fashion.

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[22] For detailed report of the Union https://www.livelaw.in/pdf_upload/centres-affidavit-in-suo-moto-covid-case-supreme-court-393164.pdf visited on July 15 2021.

The COVID crisis further necessitates that though the constitution advocates a cooperative federation, the Union and the States have to work in tandem to achieve that goals of NHP2017 without any inkling towards one-upmanship. Many a times, the political differences between Government in power at the Union and opposition parties and Governments in States play a central role to defeat the cooperative federalism concept as advocated by the Constitution. At this juncture, it is quite but natural that the Judiciary has to take the mantle on its shoulders to secure the rights of citizens. The Apex Court many a times played a decisive role in augmenting the rights of citizens brushing aside the criticism that it is stepping into the shoes of Legislature and Executive compared to its counter parts across the World. The s*uo motto* petition of the Supreme Court definitely played a crucial role in the second wave crisis where in the Union and States could work together setting aside their differences.

As the *suo motto* petition is still pending before the court, the apex court at least need to take the lead in directing the Union and States on the lines of its interim orders to increase the budgetary allocation from the current spending at least to 3% of the GDP and a National policy on health care management as a priority to increase the hospitals, health care essentials like beds, ICUs, ventilators, and the to provide health facilities after the pandemic with a time frame under its supervision and also direct the state to draft guidelines to regulate the private corporate hospitals to help people in emergencies.

The Covid-19 crisis presents a potential opportunity to the state to expand public health system which is more reliable than believing on the PPP model in encouraging the private sector as a helping partner, which proved to be in effective to cater the needs of people and the state. Further, the main organs of the State, the Legislature, Executive have to develop their formulations and legal perspectives to work in tandem to address the concerns of a pandemic and its after affects are also equally important in augmenting the right to health than only in a pandemic situation. In that direction, the Judiciary has to play a key role in supervising the activities of the State as a third Chamber to transform the future initiatives to be become a reality. Furthermore, the lack of scientific knowledge by legal scholars, jurists judges, and advocates to understand the after effects of Quarantine even in healthy persons calls for an introspection to include science and technology as a part of legal education in the country for better health care management policies and judicial decisions.

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FREE LEGAL AID TO WOMEN IN INDIA: A PAPER PROMISE

Dr. Kalpna Sharma*

"There is no chance for the welfare of the world unless the condition of women is improved. It is not possible for a bird to fly on only one wing."

-Swami Vivekananda

***Abstract*:** In a democratic country like India where rule of law is supreme; it is extremely important and essential to ensure that even the weakest among the weak, poorest among poor, does not suffer injustice. The present paper has, therefore try to investigate in general the free legal aid system and in particular the legal assistance to the women in India, their extent or level of awareness of the provisions in the existing laws relating to their right to get free legal aid. The paper will also throw light on the Constitutional provisions and other statutory provisions which make it obligatory to State to provide legal aid to weaker section of society. Further paper also visualizes the legal service authorities' functional aspect to see how far they are successful to achieve the objectives they are established with. As the free legal aid makes sure the accessibility of legal system to all citizens irrespective of their economic situation, judiciary has played a vital role. Further the paper will discuss about the specific barriers women often face in accessing legal aid and why women, in spite of being either aware of the free legal aid services, opt for private legal counsel although majority women are not aware of free legal aid services.

***Keywords*:** Legal Aid, Women, Human Rights, Equality, Laws, Legal Service Authorities.

Introduction:

India was beset by a slew of problems and malpractices at the time of independence. Economically situation was miserable and socially there were inequalities and vulnerability.[1] The Constitution makers were very much aware of these problems and they decide to declare India as a welfare state. The preamble of the Indian Constitution described India as a 'Sovereign socialist secular democratic republic' and ensures equality and opportunity for all Indian people, as well as social, economic, and political justice. The Constitution guarantees several rights such as the right to equality (Art. 14), right to life and personal liberty (Art. 21), right to equality of opportunity in the matter of public employment (Art. 16), the right to consult legal practitioner (Art. 22(1)), State shall attempt to promote welfare of the people (Art. 38) etc. to all citizens irrespective of gender. One of the guiding principles of state policy is that the government does not discriminate on the basis of gender. The above paragraph depicts that gender equality is enshrined in the preamble, fundamental rights,

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[1] There were Social inequalities and all the vulnerable sections of the society such as women, dalits, and children were deprived of basic means of living.

and directive principles of the state policy of the Indian constitution. With this Perhaps, the framers of the constitution were mindful of the precarious position of women in society, and as a result, they included some articles which are devoted to empowering women[2] and further authorizing the state to make special provisions for women.[3] A variety of laws (women and children-centric) have been passed to improve the status of women. However, the statistical data depict a different image of women in India.[4] This data shows that women in India face a range of social and economic barriers that prohibit them from exercising their constitutionally guaranteed human rights and freedoms. It is well- established fact that women make up almost half of the population and this half has not always been fairly treated all this time. It has felt handicapped economically, socially, mentally, and even physically as a result of women's inferior status in all walks of life.[5] There have been a number of instances where women have suffered simply because they are female. In such a case, women need special legal safeguards to shield them from suffering.[6] It is aching truth that personal laws in India do not treat men and women equally. Although, marriage, divorce, adoption, maintenance, succession, and guardianship are some areas where women's rights have been evolved over time, unfortunately in practice women are still discriminated against because of their sex. This discrimination of women continues when we see the condition of women in family matters, criminal matters, and other legal matters; it is of utmost urgent that they receive legal aid.[7] It is found that women face many challenges in obtaining legal aid due to a lack of gender-sensitive laws, regulations, and policies as well as a lack of understanding of their rights.

In 2019, a total of 4, 05,861 cases of crime against women were registered which shows an increase of 7.3 percent from the previous year, 2018 *i.e.* 3, 78,236.[8] According to NCRB Report, 2019 majority of cases under crime against women under Indian Penal Code 1860 were registered under 'cruelty by husband or his relatives' (30.9%), followed by 'assault on women with intent to outrage her modesty' (21.8%), 'kidnapping and abduction of women' (17.9%) and 'rape' (7.9%).[9] In 2019, the highest numbers of crimes against girl children under the POSCO Act were registered in Utter Pradesh, as were the highest number of crimes against women. The cases of dowry death and acid attack were increased over 2018.[10] This data shows that despite the laws, statutes

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[2] Art. 16(2), Constitution of India 1950 'No citizen shall, on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any one of them be ineligible for, or discriminated against in respect or, any employment or office under the State ; Art. 39(a) ensure that 'the citizens, men and women equally, have the right to an adequate means of livelihood'; Art. 39(d) ensure 'equal pay for equal work for both men and women';

[3] Directive Principles of State Policy, Constitution of India 1950

[4] Crime in India – 2019 https://ncrb.gov.in accessed on July 9,2020

[5] Maya Majumdar, Protecting our Women, 9(2001)

[6] Ibid

[7] Roma Mukherjee, Women, Law and Free Legal Aid in India, 4(1998)

[8] The Indian Express, September 30,2020

[9] Ibid

[10] Ibid

nothing has changed. Girl children are sexually abused, women are burnt for dowry, beaten badly in domestic violence, and cases of suicide and murder also increase in the recent past. There is in toto an increase in the atrocities against women. Women are denied and deprived of their rights and entitlement under various laws. In majority cases these women belongs to rural India and not aware about their right to get legal assistance. Hence ensuring legal aid to women is necessary and is need of hour to achieve substantive equality and end of justice.

Legal Aid in India: Inception and Elaboration

The idea of legal aid can be traced back to the British Justice system in India, which had a serious credibility crisis because it was unknown to the Indians. Lawyers licensed by the government to practice in Indian courts were viewed as nothing more than British tools, used to suppress any form of dissent.[11] To restore the faith of Indians in the British justice system the concept of legal aid was introduced by Britishers, as evidenced by the Code of Criminal Procedure, 1898.[12] The Indian legal aid movement has been inspired by legal developments in other countries, as mentioned earlier, especially in England. Later it was the Bombay Legal Aid and Legal Advice Committee, which made a significant study under the chairmanship of Mr. P.N. Bhagwati[13]and made some recommendations in 1949 for administrative mechanism at the state, high court, and district court, and lower court level.[14] But it was The Law Commission in its fourteenth report[15] which emphasized the need for legal aid to poor persons and persons with limited means. Further in 1976, the Government of India appointed a 'committee on juridicare' under the chairmanship of Mr. Justice P.N. Bhagwati, to address the issue of legal assistance to the weaker section of the society and to look at how the government would assist the vulnerable and secure their human rights by providing them with free legal advice and representation. Committee has made recommendations for the legal needs of economically disadvantaged people, establishment and operation of legal support programs all over Indian states.[16] Committee also recommends the inclusion of legal aid through a new article in the Directive Principles of State Policy. Hence by the forty-second Amendment (1976) in the Constitution of India, Article 39-A was added to DPSP. [17] Further,

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[11] Nishant Gokhale, The Evolution of Legal Aid in India, https://www.legallyindia.com/images/stories/docs accessed on July 10,2020

[12] Ibid, Cr.P.C. 1898 contained a provision wherein the accused when on trial for a capital offence before session court, had the opportunity to be represented by a lawyer at the expense of the State.

[13] Then Judge of Bombay High Court.

[14] *Supra note* 6 at 30.

[15] XIVth Report of Law Commission, 1958.

[16] *Supra note* 6 at 34

[17] Article 39-A Constitution of India: Equal Justice and free legal aid: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

the Committee for implementing Legal Aid scheme of Rangnath Mishra has done tremendous work in providing free legal aid and assistance to the poor and needy persons. In pursuance of this, the 'Legal Services Authorities Act' 1987 was enacted by Parliament to provide free legal services to the weaker and needy section of the society. This Act was finally enforced on November 9, 1995, after few amendments by the Amendment Act of 1994.[18] The Act was enacted to ensure access to law and justice to the poorer sections of society with an objective that no citizen's right to justice denied due to economic or other disabilities. This reflects that the provisions of legal aid to the weaker section are based on a humanitarian approach. But does it help to provide and improved the situation of legal aid in India? The question is still a question not answered satisfactorily not because we don't have effective law but because we lack to focus on effective implementation of the laws.

Free Legal Aid to Women: Constitutional and Statutory Provisions

Although the Constitution of India provides for Fundamental Rights, Fundamental Duties of citizens, and Directive Principles of State Policy, Yet it is difficult to get these enforced particularly for women. In India, women and children face a number of social and economic obstacles that prohibit them from exercising their human rights and exercising their right to equality in society. Because of gender inequality in our country, there was a requirement to make special provisions for women and children and Constitution has made special provisions for women and children. Article 15(3) of the Constitution talk about special provisions for women and children,[19] though Article 14 of the Indian Constitution[20] makes it obligatory for the state to ensure equality before the law because women always faced subordination and discrimination in society the special provisions for women are positively bring them on the equal platform it's just because only equal can be treated equally. According to Article 22 it is a constitutional obligation on the State to provide free legal aid to every indigent person under trial.[21] Article 21 of the Constitution of India states, "*No person shall be deprived of his life and personal liberty except according to procedure established by law*".[22] Hence free legal aid and speedy trial are guaranteed fundamental rights, ensuring legal aid to everyone who is in need.[23] Article 39A added in the Indian Constitution[24] to provide 'Equal justice and Free Legal Aid'

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[18] 'Legal Services Authorities'- A brief note at https://legalcarecellkvppattom.wordpress.com accessed on July 15, 2020.

[19] Article 15(3) of the Constitution states: "(3) Nothing in this article shall prevent the State from making any special provision for women and children."

[20] Article 14 of the Constitution states: "The State shall not deny to any person equality before the law or the equal protection of the law within the territory of India."

[21] Article 22(1) of the Constitution provides that "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

[22] Article 21, Constitution of India, 1950

[23] J.N. Pandey, Constitutional Law of India, at 328

[24] Article 39A, inserted by the Constitution (forty-second Amendments) Act of 1976. This Article imposed an obligation on the State to provide equal justice and free legal aid.

to the people who are unable to afford legal assistance and access to the court. The article says "*The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunities and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.*"[25] Article 21 read with Art. 39-A imposes a duty on the State to provide free legal aid and assistance to the poor and vulnerable.[26] As a result, it is essentially the State's responsibility to ensure that every member of society, including the last man who has been cornered, has the right to fair legal representation in court. Being a Directive Principle, Article 39A is not enforceable in a court of law; but this provision makes it obligatory on the state to provide legal aid to the poor and needy to ensure equal justice as promised to all citizens in the preamble of the Indian Constitution.[27] Krishna Iyer, J. said regarding the right to free legal aid, "*This is the State's duty and not Government's charity.*"[28]

Free legal aid is also available to needy and poor people in a number of statutes in India like Criminal Procedure Code 1973 in Section 304 provides legal aid to the accused person.[29] The salutary rule of Section 303 criminal procedure code provides that any person accused of an offence may be defended by a pleader of his choice, as a matter of right would remain in a vacuum if the accused cannot afford a pleader for him. Hence Section 304 [30] is in conformity with Article 39-A, which lays down that it is the duty of the State to provide free legal aid to all citizens who cannot afford legal representation in the court and ensure justice to everyone in society.[31] No specific provision in Civil Procedure Code, 1908 deals with free legal aid, however, Order 33[32] deals with the suits by indigent people. This is a noble provision in The Civil Procedure Code that enable the poor and indigent person to institute suits without payment of court fees. So Order 33 of CPC enables the persons who cannot afford to pay the court fee to file suits.[33] Section 12 of Legal Service Authority Act, 1987[34] prescribed

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[25] Article 39-A, Constitution of India, 1950.
[26] *Supra note* 23
[27] 'India is a Welfare State', at https://www.lawteacher.net/india-is-a-welfare-state.php accessed on July 18,2020
[28] *Supra note* 23 at 330
[29] Section 304, enables the Session Court to assign a pleader for the defence of the accused at the State's expense, when he/she is unable to engage lawyer for him/her.
[30] Section 304 Cr.P.C. Legal aid to accused at State expense in certain cases: 304(1) Where, in trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.
[31] *Supra note* 7 at 42
[32] Rule 9A of the Order 33 of the CPC states that the Court has the power to assign a pleader to an indigent person and exempt such person from paying court fee.
[33] Dr. Jeet Singh Mann, 'Impact Analysis of the Legal Aid Services provided by the Empaneled Legal Practitioners on the Legal aid system in city of Delhi' at http://nludelhi.ac.in accessed on 18 July 2020

the criteria for giving legal services and it clearly provides that all women and children irrespective of their social and economic background are entitled to free legal aid in India.[35] According to the Section 12 of the Legal Services Authorities Act, *Every person who has to file or defend a case shall be:*

> *(a) A member of a Schedule Caste or Schedule Tribe; or*
> *(b) A victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution; or*
> *(c) A woman or a child; or*
> *(d) A mentally ill or otherwise disabled person; or*
> *(e) A person under circumstances of undeserved want such as bring a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or*
> *(f) an industrial workman; or*
> *(g) in custody, including custody in a protective home within the meaning of clause (g) of Section 2 of the Immoral Traffic (Prevention) Act 1956 or in a juvenile home within the meaning of clause (j) of Section 2 of the Juvenile Justice Act, 1986 or in a psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987; or 2(h) a person in receipt of annual income less than Rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less then rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before Supreme Court.*[36] Further Section 7 in the Advocate Act, 1961 mention that Bar Council of India shall be giving legal aid or advice in accordance with the rules made in this behalf. Section 9 and 10(1) in the Protection of Women from Domestic Violence Act, 2005 provide legal aid to the victim of domestic violence.

Legal Service Authorities in India: Does the purpose served?

Justice P.N. Bhagwati rightly said that "*the poor and illiterate should be able to approach the Courts and their ignorance and poverty should not be an impediment in the way of their obtaining justice from the courts. Legal aid should be available to the poor and illiterate, who don't have access to courts. One needs not to be litigant to seek aid by means of legal aid."*[37] As discussed earlier, the right to free legal aid and free legal service is an essential right guaranteed under Article 14, 21 39A of the Constitution of India. Hence Legal Services Authorities Act, 1987 as amended by the Act of 1994, which came into force on

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[34] The Legal Service Authority Act, 1987 was enacted to constitute legal services authorities for providing free legal aid and assistance to the weaker and needy section of the society.
[35] *Supra note* 33
[36] Section 12, Legal Services Authorities Act, 1987
[37] 17th All India meet of State Legal Services Authorities(17th-18th Aug 2019) at Nagpur, accessed on https://nalsa.gov.in/library accessed on July 15, 2020

9 November 1995, was enacted to set up a constitutional mandate enshrined under article 14, 21, and 39A and also aims to establish a nationwide channelized set up for providing free, comprehensive, and competent legal services to the needy and weaker sections of the society i.e. the person belonging to Scheduled Caste and Schedule Tribe, women, child, a victim of human trafficking, differently-abled person, industrial workman, and person in custody in a protective home and the poor.[38] To achieve the objectives, National Legal Services Authority (NALSA) was constituted under Section 3(1) of the LSA Act, 1987 to implement and monitor legal aid programmes in the whole country. NALSA organises Lok Adalats for amicable settlement of disputes, provides free legal aid in civil and criminal matters for the poor and marginalised people. With these functions, NLSA also promotes legal literacy among the masses and introduced legal aid clinics in Law Schools and Colleges to make it a part of clinical legal education.[39] It is working with an aim to ensure that neither justice denied nor it delayed to any citizen by reason of economic disability.[40] Similarly in every state, State Legal Service Authority, and in every district, District Legal Service Authority has been constituted. At the top level, there is Supreme Court Legal Services Committee and at the taluka level, there is Taluka Legal Services Committee (TLSC). These statutory bodies have been constituted to give effect to statutory provisions, policies and to provide access to justice and legal aid for the poor.[41]The NALSA coordinates with State Legal Services Authorities for implementation of the provisions of the act. SLSA further coordinates with the DLSA and with TLSC, so this mechanism in the form of legal service authorities from top to bottom level has increased the access to justice to the poor and marginalized people. But the fund allocations to the NALSA to discharge its functions reduce year after year. In 2018 The NALSA was allocated 150 crores to discharge its functions, it came down 140 crores next year and then just 100 crores in 2020.[42] Thus at a time when our population and economy continue to grow, this amount allocation is 0.0032% of our Union Budget for the year.[43] With these limited funds the organizing awareness camps, providing benefit to eligible persons, organizing Lok Adalats to dispose of cases is a big challenge. Further, the honorarium paid to lawyers from the authority fund is nominal indeed, and such amount for services rendered of course does not help to attract lawyers to work with serious intent. Another issue raised is the lack of faith and confidence over the quality of services offered under the legal aid system. This is a harsh reality that Legal Aid Counsels are not spending reasonable time on legal aid cases while spending a good time on private cases. It has been reported by several judicial officers that they received complaints

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[38] *Supra note* 33 at 20

[39] Ibid.

[40] National Legal Service Authority(NALSA) at https://www.insightsonindia.com accessed on 25 July 2020

[41] See the Legal Services Authorities Act, 1987 for detail.

[42] Yash Agerwal, Why is the National Legal Services Authority Being Starved of Resources? At https://www.theleaflet.in Accessed on July 16, 2020

[43] Ibid.

against Legal Aid Counsels for demanding money.[44] The author wants to address here that it is the weaker section of our society, the poor one, the underprivileged one; the women without any support for her, the child who might be under any distress without his/ her parents, without any resources need free legal aid and services because they cannot access justice without the support of lawyers. Hence we need to understand that in spite of such an effective mechanism under legal service authorities a large majority of needy persons are not in a position to access legal assistance and free legal aid.

Notwithstanding these Constitutional as well as statutory provisions and Legal Services Authorities, which are instituted to respond to the legal assistance and need, to the weaker section of society (available to women and men in the same manner), legal aid is still not available to many people especially women and hence access to justice and legal aid is yet to be realized by women in India, representing half of its population. The author would like to mention here that despite the fact that India has enacted a number of legislations to improve women's position and to ensure equality of status and opportunity enshrined in the Constitution; realistically it looks like women are still sufferers of biases and discrimination in India. Women are still deprived of access to justice and equal status; hence the Constitutional Provisions and legislations to provide free legal aid to women seem rhetoric only. As discussed in this paper that biggest hurdle to securing justice through legal aid services is non-cooperative approach of lawyers. Another aspect to throw light on is that there is not enough women representation is there among panel lawyers, and PLVs which is essential to serve people who face socio-cultural barriers when they step forward for legal assistance. Special measures must therefore supposed to be taken to ensure that legal aid is effectively accessible to women.

Legal Aid to women in criminal and matrimonial matters:

About 86% of women who experienced violence never sought help, and 77% of the victims did not even mention the incident(s) to anyone.[45] National Family Health Survey data reveals that over 30% of Indian women have been physically, sexually, or emotionally abused by their husbands at some point in their lives and many women have experienced sexual harassment or sexual assault at their workplace and keep silent about the incident.[46] The crime rate for crimes committed against women has been continuously increasing in the last few years. It has been found that the majority of Indian women registered

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[44] Legal Services Authorities (LSA) though optimistic in intention has been unable to achieve its objectives at https://www.civilsdaily.com accessed on 25 July 2020

[45] Domestic violence complaints at a 10 years high duringCovid-19 lockdown, The Hindu, 22 June 2020 at https://www.thehindu.com accessed on 28 July 2020

[46] Sreeparna Chattopadhyay and Suraj Jacob, Victim of Domestic Violence in India rarely come forward or seek help, Wire, 11 January 2019 at https://www.google.com/amp/s/m.thewire.in accessed on 28July 2020

criminal cases under Section 498A of the Indian Penal Code.[47] Other crimes committed against women vary from simple harassment, physical and mental torture, rape, sexual harassment, honour killing, kidnapping and abduction of women, etc, Majority of these crimes are committed within four walls of the house or even outside at lonely places. In spite of various new legislations that have been brought and amendments have been made in existing laws with a view to handle these crimes effectively; statistical data is simply frightening.[48] In this alarming situation, cases related to crime against women should be given priority by courts. While legal literacy camps can help in awareness drive among women about legal assistance and advice, cooperative behavior of police authorities and timely legal assistance by empaneled lawyers through paralegal volunteers can reduce their miseries to some extent. In criminal matters, it has been observed that women hesitate to narrate the situation and facts to the lawyer if he is a male. Therefore legal service authorities should empanel more women lawyers and paralegal volunteers to approach more women to make them aware of their rights and entitlements of legal aid and assistance.[49] So far the matrimonial offences are concerned, the world over legal aid societies have done yeoman services, India as a country of a heterogeneous population and various religious beliefs, the existing matrimonial laws in India are based on the tenets of religious freedom of the two people concerned. Hence there is no single legal framework governing the institution of marriage except The Special Marriage Act, 1954 which is secular matrimonial law.[50] Core issues in matrimonial matters are divorce, judicial separation, custody of the child, same-sex marriages, etc. Although The Family Court Act 1984 makes provisions for the establishment of family court with a view to settling the family matter disputes speedily and despite the fact that family courts have been successful in resolving matrimonial matters to a large extent, in the last few years there has been an increase in matrimonial matters.[51] The author has observed that in the majority of cases of matrimonial disputes women face harrowing experiences with emotional trauma and social stigma attached to them. Prevalence of oppressive social practices and discrimination on the basis of gender always denied justice to Indian women. Women sometimes don't need legal aid they are actually in need of advice. Hence the legal service authorities can ensure legal advice and counseling to women by conducting legal literacy awareness camps at the village level and assist them in their legal battle by providing legal aid in the sense of providing counsel and bearing other expenses of the court trial i.e. court fee, processing fee and other charges. Because legal aid is an essential

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[47] Section 498A : Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extent to three years and shall be liable to fine.

[48] *Supra note* 7 at 211

[49] Rintu Marium Biju, India Justice Report 2019 : only 15 million out of 1 billion eligible Indians provided legal aid services in last 14 years, 11 November 20019 at https://www.barandbench.com accessed on 1 August 2020.

[50] The Special Marriage Act, 1954 is a regulatory law governing both inter-caste and inter-religious marriages in India. This act applies to all person of all religions.

[51] Divya Choudhary, Approach of Family Courts in settling Matrimonial Disputes, at https://www.google.com/amp/s/blog.ipleaders.in accessed on 30 July 2020

component of fair and effective criminal justice based on the rule of law, legal service authorities can help in facilitating the victims in the legal proceedings and increase the access of justice to the poor and under privileged. We have noble legislations to help poor and needy ones, but the question is, do they understand the law? How we can help them. This is the real challenge while executing the law we have, to provide legal representation and legal assistance to the needy ones. The legal assistance and legal awareness is extremely important because 50% women population who is living below poverty line and around 70% who are illiterate women and large section of people just do not know that if they are unable to afford legal representation in criminal trial, they are entitled to free legal assistance to them at State cost.

Recognition of Legal Aid by Indian Judiciary: glimmer of hope:

In the Constitution of India, Articles 14 to 18 deal with equality in general. While article 14 provides equal protection of law and equality before law irrespective of religion, caste, sex, race, or place of birth, article 15(3) empowers the state to make special provisions for women and children. Article 22(1) states the right to consult and to be defended by a legal practitioner of his or her choice on the arrest of a person. Judiciary has always responded positively, upholding the provisions of the Constitution of India.[52] In spite of pendency and overburdened with cases, the Indian judiciary recognizes legal aid as a very important tool to access justice. Article 39A of the Constitution of India states 'Equal Justice and free legal aid' and stated that the court has to ensure equal opportunity of justice to everyone and free legal aid to the deprived and underprivileged citizens. Justice P.N. Bhagwati rightly said that "*legal aid means providing an arrangement in the society which makes the machinery of administration of justice easily accessible and in reach of those who have to resort to it for enforcement of rights given to them by law*"[53] Judiciary has actually enforced and implemented free legal aid in a number of cases. In *Madhav Hayawadanrao Hoskot vs State of Maharashtra 1978 AIR 1548,* the Supreme Court considered the problem of legal aid keeping in view Article 22(1) and 39A. Apex court observed that the philosophy of legal aid is an inalienable element of fair procedure. The court observed that democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness. In *Suk Das &Anr vs Union Territory of Arunachal Pradesh 1986 AIR 991* Bhagwati, C.J. observed that the absence of legal awareness is responsible for the deception, exploitation, and deprivation of rights and benefits of the poor people. The court explained that free legal assistance at State Cost is a fundamental right of a person accused of an offense that may involve jeopardy to his life of personal liberty and this fundamental right is implicit in the requirement of reasonable, fair, and just procedure prescribed by Article 21. It has been observed that because of ignorance and illiteracy poor people cannot become self-reliant and the law ceases to be their

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[52] *Supra note* 7 at 3

[53] Suchitra Yadav, Issues in implementation of free legal aid schemes – critical analysis of Article 39A of the Constitution of India at https://www.google.com/amp/s/blog.ipleaders accessed on July 25, 2020

protector because they do not know that they are entitled to the protection of the law and they can avail legal assistance and legal aid. *1979 SCR(3) 532* the apex court realised that legal system has lost its credibility for the weaker sections of the community. It is therefore, necessary to inject equal justice into legality and that can be done only by a dynamic and activitst scheme of legal services. Court emphasised on the urgent necessity of introducing a dynamic In *Sheela Barse vs. State of Maharashtra 1983 AIR 378, 1983SCR(2)337* Supreme Court laid down that legal assistance to a poor or indigent accused, arrested and put in jeopardy of his life or personal liberty, is a constitutional imperative mandated not only by Art. 39A but also by Articles 14 and 21 of the Constitution. Justice Bhagwati observed that essentially legal assistance must be made available to prisoners in jails whether they are under-trials or convicted prisoners. Every act of injustice corrodes the foundations of democracy and the rule of law. In *Hussianara Khatoon v. State of Bihar* and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their living conditions and to deliver justice to them. In *Labhu Laxman vs State of Gujarat (1999) 1GLR889* Gujarat High Court held that we should never forget that the right of free and competent legal aid, is , a 'sine-qua-non' for up keeping and sustenance of the rule of law which is one of the important basic structures of the Constitution of India. The court said that the right to legal aid has become almost like a fundamental right by a catena of judicial pronouncements by Constitutional Courts and the honourable Supreme Court. In *Centre for Legal Research and Anr. Vs. State of Kerala Air 1986 SC 1322* court held that if the legal aid programme is to succeed it must involve public participation. The Court points out that under Article 39A state government is under obligation to set up a comprehensive and effective legal aid programme to ensure that the operation of the legal system promotes justice on the basis of equality. Hence voluntary organizations and social action groups must be encouraged and supported by the state in operating the legal aid programmes. The case laws and judgments on legal aid mention above are not exhaustive. There are many more where the Judiciary has done a commendable job while addressing the issue of providing legal aid to needy ones including women in India.

Conclusion:

Legal aid services are not only restricted to representation in court cases but also include spreading legal literacy, facilitating the implementation of welfare law and schemes, for underprivileged people. Under NALSA (Legal Aid Clinic) Regulations, 2011, legal Aid Clinic is required to be set up in all villages or cluster of villages. In conclusion, the author will like to address the need for special provisions for free legal aid to women. The traditional legal service programmes consist of providing legal assistance to the poor seeking judicial redress, is not adequate to meet the specific need and special problems of women in our country.[54] It must be, seriously, noted that legal aid is not a

[54] *Supra note* 5 at 164

matter of charity or mercy. It is an important right backed by the Constitution and that is the reason why the Government of India in its national and legal aid policy programmes devised the Legal Services Authorities Act, 1987, and has amended from time to time and, thereby, translating the spirit of Article 39-A. [55] As the 'legal aid' phrase is, designedly, given a go –by in the Legal Services Authorities Act, 1987, replacing it by the expression 'Legal Services'. 'Aid' means, to assist or to help, whereas, 'services' means to perform the duty. Therefore it can, safely, be concluded that legal aid is not merely, a right of the needy and deserving but is, corresponding, the duty of the authority to make it available to the deserving and the needy one.[56] In the field of legal aid and legal education, legal aid societies can do a lot. In the present scenario use of technology to provide legal aid could contribute to speed up access to justice. Further, it is absolutely essential that people should be involved in the legal aid programme because the legal aid programme is not charity or bounty but it is a social entitlement of the people. Even when a right to legal aid—civil or criminal—is not specifically articulated in domestic law, the duty to provide legal aid is a critical part of the duty to ensure three fundamental rights guaranteed by all international and regional human rights instruments, namely, rights to: equality before the law, the equal protection of the law, and an effective remedy, by a competent tribunal, for human rights violations.[57] The author found that most of the laws for women suffer from various loopholes and remain confined to statute books. For women in India, the legal aid seems to be a paper promise as the enforcement mechanism is inadequate also the patriarchal social set-up stop women to report the atrocities they are suffering from and hence they do not come to report the abuse and assault at home and outside. Therefore as long as sexual discrimination exists in society, providing legal aid to women to uphold the right to equality and human dignity is of utmost importance.

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[55] *Labhu Laxman vs State of Gujarat (1999) 1GLR889*
[56] Ibid
[57] Gail Davidson & Heather Neun, International Law Obligations to Provide Legal Aid, available at https://www.lrwc.org/ws/wp-content

DECONSTRUCTING ANTI-CORRUPTION CLAUSES IN INDIA'S MODEL BILATERAL INVESTMENT TREATY, 2016

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***Abstract*:** The very initiation of international investment treaties has ensured a positive environment for the investors by ensuring grant of protection by the host states to their investments. BITs have a positive impact on international investments. This mechanism is missing in major international dispute settlement institutions like International Court for Justice (ICJ) and World Trade Organization's (WTO) dispute settlement body (DSB) where only States can be party to the dispute. However, under the ISDS mechanism, an individual investor can bring a claim against the States. Along with such successes of the BITs, the increased flow of foreign investments has caused the problem of corruption. Many MNCs despite having various internal and external guidelines often find themselves involved in corruption. A critical examination has to be done considering the very problematic aspect of anti-corruption clauses in the Model Indian BIT, 2016; and the absence of counter claims provisions in the Model Indian BIT, 2016.

***Keywords*:** Anti-Corruption Clause, Investment Treaty, Dispute Settlement.

Introduction:

In a recent report[1] released by US Department of Justice (DoJ) in June 2019, Walmart pleaded guilty in a seven-year long case brought against it on grounds of corruption. The company was found guilty of bribing officials in four countries including India to secure permits for its business.[2] Report[3] suggests that the company previously denied any such allegation as it claimed that such political lobbying is allowed under US laws and it did the same in Washington DC and not New Delhi. As per Indian Laws, there exists ambiguity in definitions of bribery and political lobbying. While the Prevention of Corruption Act, 1988 provides some relief in case of defining bribery and other forms of illegal

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[1]For more information, See the Official Statement released by US Department of Justice, *Walmart Inc. and Brazil-Based Subsidiary Agree to Pay $137 Million to Resolve Foreign Corrupt Practices Act Case*, Office of Public Affairs, Department of Justice, (June 20, 2019), https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt.

[2]*Walmart to pay $283 mn fine in US over bribery charges in India, other countries*, LiveMint (June 21, 2019) https://www.livemint.com/companies/news/walmart-to-pay-283-mn-fine-in-us-over-bribery-charges-in-india-other-countries-1561086810397.html.

[3]*Walmart continues to lobby in US over India retail FDI rules*, The Hindu Businessline (April 13, 2013) https://www.thehindubusinessline.com/news/world/walmart-continues-to-lobby-in-us-over-india-retail-fdi-rules/article20605624.ece1.

pecuniary gratifications, lobbying is completely missing in Indian laws. Due to the lack of defined regime of legitimate lobbying in India, most of the corporate houses route it through public relations firms.[4] Sometimes, just like Walmart[5], even to an extent of crossing the line where it becomes illegal.

When it comes to cases involving multi-national corporations (MNCs), the problem is not merely limited to ambiguity in domestic laws, but extends to the problematic text of international investment treaties. These international treaties under which a foreign company gets its investments protected are often called as bilateral investment treaties (BITs) or international investment agreements (IIAs). India has signed over 70 BITs with other countries, many of which it terminated in the year 2017[6]. However, due to the presence of sunset clause of either ten or fifteen years in these BITs, most of these BITs are still in force. This was a step taken following a decision in 2015 to replace 2003 model BIT with a new model BIT of 2016, since which India has entered in just one BIT with Belarus in the year 2018.

International Investments and Corruption:

The advent of international investment treaties has ensured a positive environment for the investors by ensuring grant of protection by the host states to their investments. Most of the researches have concluded that BITs have a positive impact on international investments.[7] Along with the BITs, investor-state dispute settlement system (ISDS) has provided an unprecedented right to investors to bring claim against host states before arbitration tribunals[8]. This ensure clarity, predictability and timely resolution of disputes relating to foreign investments. This mechanism is missing in major international dispute settlement institutions like International Court for Justice (ICJ) and World Trade Organization's (WTO) dispute settlement body (DSB) where only States can be party to the dispute. However, under the ISDS mechanism, an individual investor can bring a claim against the States. Along with such successes of the BITs, the increased flow of foreign investments has caused the problem of corruption. While corruption and foreign investments are directly opposite to each other, yet, in countries where corruption is rampant, MNCs do involve

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[4]Diljeet Titus, *Corportate Lobbying and Corruption- Manupulating Capital*, 4(III) India Law Journal (2011), https://www.indialawjournal.org/archives/volume4/issue_3/article_by_diljeet_titus.html

[5]Supra note 3.

[6] Kshama Loya Modani, *Why India's Model Bilateral Investment Treaty Needs a thorough Relook*, Business Standard (Dec 31, 2018) https://www.business-standard.com/article/economy-policy/why-india-s-model-bilateral-investment-treaty-needs-a-thorough-relook-118123100150_1.html

[7] For more information, *See*NitiBhasin and RinkoManocha, *Do bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41(4) Vikalpa 275 (2016), https://journals.sagepub.com/doi/full/10.1177/0256090916666681 (accessed 7.1.2020).

[8] Investor-State Dispute Settlement: Review of Developments in 2017, Issue 2 (June 2018) https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf (accessed 7.1.2020)

themselves in such practices to get their permits and licenses. Apart from Walmart, there are many other MNCs who have been found guilty of engaging in such activities. One such case was of Siemens AG[9] which approached arbitration tribunal against expropriation by Argentina. Siemens won the case, but when Argentina initiated the annulment petition, the corrupt practices of Siemens came to light.[10] Similarly, in World Duty Free Co. Ltd. v. Republic of Kenya[11], instances of bribing then Kenyan President came to light during the arbitration proceedings. Another such instance pertains to Alcatel owned by Nokia, a famous telecom service provider, which bribed officials in Costa Rica to secure licenses.[12] In a recent investigation another instance came into light where the American IT giant, Cognizant was found guilty of bribing Tamil Nadu government officials for its Chennai campus.[13] Many such instances in the third world countries have been reported over years where many international companies have been complicit in corrupt practices. Going by these instances, a conclusion that can be drawn is that many MNCs despite having various internal and external guidelines often find themselves involved in corruption.

Anti-Corruption Obligations under the Model Indian BIT, 2016: A Critical Examination

This critical examination has to be done in two-fold manner. First, the very problematic aspect of anti-corruption clauses in the Model Indian BIT, 2016; and Secondly, the absence of counter claims provisions in the Model Indian BIT, 2016.

Problematic Aspects of the Anti-Corruption Clause in Model Indian BIT, 2016

Prior to the final document, the draft articles for the Model Indian BIT proposed various provisions such as obligation against corruption[14], however, in the final document, the clause has been significantly diluted. Under draft articles, Article 9 dealt with investor obligations against corruption. The provision stated[15]:

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[9]*Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08, Award (Feb. 6, 2007).

[10] Brendan Pierson, *Ex Siemens Employee Pleads Guilty in US to Argentine Bribery Scheme*, Reuters UK (Mar. 16, 2018) https://uk.reuters.com/article/uk-siemens-corruption/ex-siemens-employee-pleads-guilty-in-u-s-to-argentine-bribery-scheme-idUKKCN1GR3A9 (accessed 16.3.2016).

[11]*World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7 (Oct. 4, 2006).

[12]For more information *See*, Alcatel-Lucent / Instituto Costarricense de Electricidad (ICE) (Costa Rica Settlement Case) (July 20, 2017) https://star.worldbank.org/corruption-cases/node/18453 (accessed 7.1.2020).

[13] Economic Times (Sept. 16, 2019) https://economictimes.indiatimes.com/news/company/corporate-trends/ex-cognizant-coo-to-pay-50k-fine-in-bribery-case/articleshow/71144904.cms (accessed 8.1.2020).

[14] Article 9, Draft Model Indian BIT 2016, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed 8.1.2020).

[15]Ibid.

> "9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.
> 9.2 Except as otherwise allowed under the Law of the Host State, Investors and their Investments shall not engage any individual or firm to intercede, facilitate or in any way recommend to any public servant or official of the Host State, whether officially or unofficially, the award of a contract or a particular right under the Law of the Host State to such Investors and their Investments by mechanisms such as payment of any amount or promise of payment of any amount to any such individual or firm in respect of any such intercession, facilitation or recommendation.
> 9.3 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organizations. Any political contributions and disclosures of those contributions must fully comply with the Host State's Law.
> 9.4 Investors and their Investments shall not be complicit in any act described in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such act."

However, in the final draft, only the first provision has been retained[16]. This dilution has significant impact as at the domestic level the laws still do not clearly demarcate between lobbying and bribery.[17]Had the provision been retained, at least under the BIT, this ambiguity would have addressed to a limited extent. The retained provision has not been clearly categorized as an Obligation against Corruption, as it was done in the draft articles[18]. Under the draft articles, there were six provisions[19] under the chapter dealing with investor obligations[20]. However, in the final draft, only two provisions- compliance with host state's laws[21] and corporate social responsibility[22], have been retained. This dilution has resulted in less clarity as to what is the law is regarding lobbying in India.

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[16]*See* Article 11.1 Model Indian BIT, 2016.
[17] AK Bhattacharya, V Mukherjee, *Lobbying and Bribery*, 7 (2) Studies in Microeconomics 238, Sage Publications (March 2019) https://journals.sagepub.com/doi/abs/10.1177/2321022219827397?journalCode=mica (accessed on 8.1.2020).
[18] For more information *See*, Chapter III, Article 9, Draft Model Indian BIT 2016, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed 8.1.2010).
[19] For more information *See*, Chapter III, Articles 9-13, Draft Model Indian BIT 2016, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed 8.1.2010).
[20] The Chapter III of the Draft Model BIT dealt with Investor, Investment and Home State Obligations, For more information *See*, Chapter III, Draft Model Indian BIT 2016, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed 8.1.2010).
[21] Article 11, Model Indian BIT, 2016.
[22] Article 12, Model Indian BIT, 2016.

While, it is true that such a provision would not have made much impact on the asymmetrical nature of the BITs as the anti-corruption clauses are mostly used as a defence to a claim under the ISDS mechanism.[23] Recently their use has significantly increased recently. In cases of the defence of corruption, the jurisdictional aspect of the tribunal is challenged by host states as the investment which is made on the basis of corrupt and illegal activities is itself not protected under the BIT. This has been the issue in World Duty Free Case where the tribunal dismissed the claims of the investor when during the process it was found that the investor has bribed the Kenyan President in order to gain contacts into the Government. The tribunal rejected this on the basis of international public policy[24] against which an integrated international action is often required. Even in Metal-Tech v Republic of Uzbekistan[25] where the expropriation claim by the investor against the State was dismissed, as the investment itself was established on the basis of corruption.

In light of above examples, and in absence of clear domestic law to demarcate between corruption and lobbying, it is important for the Indian BITs to be carefully drafted leaving less space for such ambiguity.

Absence of Counter-Claim provision in the Model Indian BIT, 2016

Currently, in most of the bilateral investment disputes, states do not invoke counter-claims against the investors because of their absence in the treaty texts. The states rather use the illegitimate conducts of the investors in form of defence. Such "counterattacks" may include arguments that the investment was illegal from the start, that its operations in due course violated local law, or that the investor breached its direct obligations to the State under a contract.[26]A counterclaim in investor-state disputes is a claim submitted by a respondent in opposition to the claimant's claim.[27] Since investors initiate nearly all investor-state disputes, counterclaims are typically submitted by host States.

The absence of counter claims provisions in most of the treaties suggests that states are not yet ready to incorporate this into their treaty practice. There might be several reasons for it. One of the reasons may lie in an instinctive preference by States to pursue any affirmative claims in their own courts rather

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[23]J Reynoso et.al.,*The Corruption Defence: Practical Consideration for Claimants,* Kluwer Arbitration Blog, (Jan 22, 2019)http://arbitrationblog.kluwerarbitration.com/2019/01/22/the-corruption-defense-practical-considerations-for-claimants/ (assessed 8.1.2020)

[24]*World Duty Free Company v Republic of Kenya*, ICSID Case No. Arb/00/7

[25]Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3

[26] Counter Claims by States in Investment Arbitration, IISD, Available at: https://www.iisd.org/itn/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/

[27]Black's Law Dictionary defines counterclaim as "[a] claim presented by a defendant in opposition to or deduction from the claim of the plaintiff." BLACK'S LAW DICTIONARY 349 (6th ed. 1990).

than bringing that to international arbitration forums[28] as it might result in States losing control over the judicial process in such cases.

Generally speaking, in most investment disputes, the scope of the parties' consent for purposes of jurisdiction – including whether the parties have consented to arbitrate counterclaims – is determined by the host state's offer to arbitrate which is usually contained in a treaty.[29] Typically, investment treaties provide that only claims directly related to investments can be brought before an arbitral tribunal. This means that disputes subject to arbitration cannot extend to any type of conflict between the investor and the home State, unless the conflict is part of the 'investment dispute'.[30] In general cases of defence, the defence must pertain to the subject matter of the dispute. A defence can never result in parallel claims. However, by incorporation of counter claims provision, a parallel counter claim can be brought against the investor which may not even relate to the subject matter.

In the draft Model Indian BIT, Article 14.2 (b) gave power to parties to raise counter claims. The provision read *"a counterclaim brought by a Party against an Investor or the Investment in an Investment Dispute pursuant to Article 14.11."*[31]

Article 14.11 dealt with the procedure governing the counter claims. It stated, "*A Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation."*[32]

However, this provision too was dropped from the final treaty text. The absence of such provisions in the treaty text leads to the same assumption of BITs being asymmetric in nature, where despite availability of provisions containing investor obligations, the host state might merely use them as a defence. While naturally, the result of incorporation of such a provision might have scared investors, yet in a global market where many players are often involved in issues such as large scale corruption, such a right for host states is becoming overwhelmingly vital.

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[28]Supra 26.
[29] Ibid.
[30] Eric De Brabandere, Human Rights Counter Claims in Investment Treaty Arbitration, available at: https://oxia.ouplaw.com/page/723
[31] Draft Model BIT 2015, available at: https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf
[32] Draft Model BIT 2015, available at: https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf

Anti-Corruption Clauses in other Newer Generation Investment Treaties, BIT by BIT:

Not long ago, a common perception about bilateral investment treaties (hereinafter BITs) in both academia and practice was that they are highly asymmetrical favouring investors over state's power to regulate. However, a shift was seen post 2010 when many of the arbitration awards by international tribunals started giving precedence to host state's powers over unfettered abuse of rights granted to the investors under most of the BITs. As a result of this jurisprudential development, many BITs in recent past have started including investor obligation provisions in their specifically negotiated terms. One such change was the introduction of Anti-Corruption provisions under BITs. Many of the international investment agreements both bilateral and multilateral have started including such provisions. For example, the Pan African Investment Code, 2016 (PAIC) under article 21 clearly deals with the infamously overwhelming problem of bribery by foreign investors in various African nation states. Similarly, one of the most advanced BITs of our times, the Nigeria-Morocco BIT often cited as a model to be followed by other countries, also includes Anti-corruption provisions under article 17. This trend has continued in various other treaties such as CARIFORUM-UK Economic Partnership Agreement (EPA), 2019[33], Brazil-UAE BIT[34], Brazil-Guyana BIT[35], Argentina-Japan BIT[36], etc.

Out of these investment treaties, CARIFORUM-UK EPA is of significant importance as the Article 237 of CARIFORUM-UK EPA while dealing with obligations against corruption provides a clear reference to UN Convention Against Corruption, UN Convention Against Transnational Organized Crimes and UN Convention for Suppression of Terrorist Financing.[37] The careful treaty drafting in the context of CARIFORUM States and the UK makes it possible for the forums to unite the two fragmented but interrelated regimes of international investment law and international criminal law. This approach seldom appears in treaties as most of the investment treaties lack such clarity and relevant reference to other international conventions which not merely combats such problems but also establishes clear relationship between the two fragmented regimes of law. However, on the other side, one must be careful with the reference to such international convention as it is often seen that investment

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[33] See Economic Partnership Agreement between the CARIFORUM States, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, Article 237, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5822/download

[34] See Cooperation And Facilitation Investment Agreement Between The Federative Republic Of Brazil And The United Arab Emirates, Article 16, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5855/download

[35] See Article 16, Brazil-Guyana BIT, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5763/download.

[36]Article 9, Argentina Japan BIT, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5799/download

[37] Supra 22.

arbitration tribunals go beyond their mandates and get involved in rule making and laying down tests. Such references although necessary to bring clarity to the law should be used in limited sense.

Conclusion:

In the world where the investment treaty arbitration is highly scattered and is often manifested through ad-hoc mechanism, it becomes important to make it more transparent. The alternative dispute resolution mechanism is known for the privacy of the parties involved in disputes, yet when it is ISID mechanism, it involves a lot of components from public domain such as public funds, state's right to regulate, etc. In such cases transparency becomes important as States often upon illegitimate expropriation pay off the compensation from public funds, which might have been used for better purposes like infrastructure development, education, affirmative action for marginalized classes, etc. In such a scenario, where the State and the investor in name of privacy may act against larger public consensus, it becomes important that the anti-corruption provisions along with counter-claims are present in the treaty text. While in some of the cases[38], the arbitration tribunals have allowed counter claims by state based on a broadly formulated investor-State arbitration clause, which according to the Tribunal allows states to present any claim against the foreign investor if such claim is 'in connection with an investment'.[39] However, since the incorporation of investor obligations pertaining to anti-corruption, environment, public health, etc in most of the newer generation BITs, a case for admissibility and jurisdictional requirements of counter claims can be easily made.

India, so far as its model BIT is concerned, needs to revisit many aspects. A BIT which is often entered into by a capital exporting country is significantly different from a BIT by a capital importing country. What is more important for India is to ensure what role it has to play in the global market in the near future. Balancing the interests of both these groups is what specific negotiations and careful treaty drafting can achieve.

While, there is always risk of scaring investors when it comes to incorporation of provisions like counter claims and investor obligations, which might have bad implications for over all foreign flow of investments, yet, in a world characterized by multi-national corporations often involving in illicit activities, it becomes important to balance such asymmetrical nature of BITs by supplementing State's right to regulate with such provisions.

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[38] Kryvoi, Yaraslau, "Counterclaims in Investor-State Arbitration" (2012). Minnesota Journal of International Law. 321, Available at: https://scholarship.law.umn.edu/mjil/321

[39] Supra 30

JUDICIAL CONUNDRUM ABOUT FIRST TWENTY FOUR HOURS UNDER SECTION 167 CRPC

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Abstract: Personal liberty has been considered so sacrosanct an aspect of individual existence that not only our legislature through sections 56, 57, 75, 76 and 167 CrPC, 1973 but also our forefathers- the Constitution framers- through Article 21 and 22 jealously guarded it- through the '24 hours rule'. Any interpretation of law which curtails this protection is bound to create ripples in the judicial circles. This article gives an insight into the dichotomy of views taken by the two sets of Supreme Court opinions; and recommends the approach which is desirable in this context.

Keywords- Bail, Article 21, Personal Liberty, Arrest, Custody, Challan, Jail, Article 22, 24 Hours, Police Custody, Statutory Bail, Section 57 CrPC, Magistrate, Section 167 CrPC, Detention, Investigation, Prosecution.

Introduction:

Personal liberty has been enshrined as fundamental right in the Constitution of India vide Article 21 and it has been so stated in a catena of cases by the Supreme Court of India.[1] In a case[2] the Apex Court observed, "Personal liberty is the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm of state but an essential requirement of any civilized society". Criminal law is considered to be the most sensitive law in this respect as it deals directly with the right of people to be free from any sort of restraint on their personal liberty. Article 21 as said above clearly provides that no person shall be deprived of his life including his personal liberty except according to the procedure established by law. This 'procedure established by law' has then been interpreted as 'due process' by the Supreme Court[3] apparently in an overzealous attempt to safeguard personal liberty.

Constitutional Reflection:

Bail or Jail is a matter which directly deals with the personal liberty of people. In this respect as if the declaration about personal liberty in Article 21 was not enough, our forefathers have incorporated certain other provisions in the Constitution as Article 22 which through its clause (2) provides that if a person is arrested by the police, within a period of twenty four hours of such arrest he shall be produced before the nearest magistrate where such period of

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[1]See e.g. Kharak Singh v State of Uttar Pradesh 1963 AIR 1295

[2]SiddharamSatlingappaMhetre v State Of Maharashtra (2011) 1 SCC 694

[3]See R.C. Cooper v Union of India, A.I.R. 1970 S.C. 564; Maneka Gandhi v Union of India (1978) 1 SCC 248; RanjanDwivedi v Union of India (1983) 2 S.C.R. 982

twenty four hours shall exclude the time necessary for the journey to take place from the place of arrest to the magistrate. It further provides that in no case when a person is arrested by the police, he shall be detained in any custody of whatever nature beyond such twenty four without the authority of a magistrate before whom the person so arrested has to be produced within the said period. This requirement of production before magistrate is dispensed with when the arrested person is granted bail by the police itself; otherwise it remains.

The primacy given to the rights contained in Article 22 is clearly reflected by the fact that it is placed in part III of Indian Constitution under a sub-chapter headed 'Right to Freedom'. Articles 21 and 22 in a sense go together as the later advances the purpose of the former in a concrete way by guaranteeing certain fundamental rights to the arrested person laying down the specific way in a time bound manner in which a person arrested must be dealt with.

Approach of Judiciary:

The importance attached to these rights guaranteed to people with the avowed purpose of saving their personal liberty from the coercive actions of state authorities is clearly reflected in a Supreme Court judgment[4] wherein it was observed that, "Any physical restraint imposed upon a person results in the loss of his personal liberty and must accordingly amount to his arrest. It is wholly immaterial why or for what purpose such arrest was made. Mere imposition of physical restraint, irrespective of its reason is arrest and as such attracts the application of constitutional safeguards guaranteed by Article 22". As for the arrest with or without warrant in the context of application of Article 22, showing greater concern for protection in case of arrest *without* warrant, in the same case it was observed that, "There can be no manner of doubt that arrests without warrants issued by a court call for *greater* protection than do arrests under such warrants. Warrant ensures the immediate application of judicial mind and so there is less reason for making it a matter of substantive fundamental right to be guaranteed under the Constitution. The requirement of Article 22 (1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest indicates that the clause really contemplates an arrest *without* a warrant of court because a person arrested *under* a court's warrant is made acquainted with the grounds of his arrest *before* the arrest is actually effected. Hence, the language of Article 22 (1) and (2) clearly indicates that the fundamental right conferred by it gives protection against arrests which are effected *without* warrant".

Statutory Framework:

The placement given to these rights by the Constitution framers and the intricacies highlighted and discussed by the Supreme Court in this area viz. arrest, custody, bail and jail provide a clear indication of their role and importance in any state set-up boasting of based upon rule of law. This anxiety

[4]State v Ajaib Singh 1953 AIR 10

of our forefathers and the concerns shown by Apex court in jealously guarding the personal liberty of its people also reflect in our statutory laws especially in Criminal Procedure Code (hereinafter CrPC) which squarely deals with such matters vide sections 41, 41B, 46, 49, 50, 56, 57, 75, 76 and 167. In this context, section 56 CrPC provides that the police if arrests a person without warrant, it shall without unnecessary delay take him to a magistrate. This shall however be subject to bail as the police may grant under chapter XXXIII of CrPC. Section 57CrPCprovides that in case of an arrest without warrant the period of taking the person arrested to the magistrate shall not exceed twenty four hours excluding therefrom the time required for journey from place of arrest to the magistrate. As for arrest with warrant, section 76 CrPC says that the person so arrested shall be produced before the court which as per law he is required to be produced within a period of twenty four hours excluding therefrom the time necessary for the journey from the place of arrest to the magistrate's place. The legislature's anxiety to keep the people away from restraint upon their personal liberty at the hands of state officials without application of judicial mind in the form of magistrate's interference within twenty four hours of arrest is clearly reflected in these statutory provisions.

In this context, section 167 CrPC further fortifying this idea of 'no restraint upon personal liberty by state officials without interference of judicial magistrate' provides that for the time beyond twenty four hours as contemplated by section 57 and section 76 CrPC, it shall be the magistrate again who shall authorize arrestee's further detention in police or judicial custody as the case may be. Section 167 CrPC provides that if the magistrate is of the view that the investigation cannot be completed within twenty four hours and the accusation against the person arrested prima facie appears to be well founded after perusing the case diary etc. he may authorize his further detention with police or prison authorities as the case may be. The magistrate when so authorizes the extension of detention has to record his reasons in writing. The fairness of procedure has not only been ensured by the presence, authority and recording of reasons in this matter by the judicial magistrate but also the presence of accused *in personam* has been made a must for extending his custody with the state officials- police or prison. To top it all to eradicate any possibility of collusion of whatsoever nature, there is one explanation[5] in section 167 CrPC which provides that, "If any question arises whether an accused person was produced before the magistrate, the production of the accused person may be proved by his signature on the order authorising detention". If we look upon it in a critical way, this explanation contemplates even the judicial magistrate as a possible party to state collusion and hence the final check to ensure the life of arrestee that he was alive on the day of extension of his custody and that he was actually produced before the magistrate has been put in place by requiring his signature on the order of extension of his custody under section 167 CrPC.

As if all of the abovementioned was still not enough, the legislature within section 167 CrPC further provides a ceiling for the detention and its extension even by the judicial agency i.e. magistrate. It prohibits a magistrate to

[5] Explanation II to Section 167 (2) CrPC

extend the detention of an arrestee beyond 90 days if the offence is punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; and beyond 60 days if the offence is otherwise. Clearly it has been provided in an objective and mathematical way without leaving any sort of possibility of application of any judicial mind or discretion for that matter if the offence is punishable with a term of not less than ten years[6] imprisonment including capital punishment, in such case the challan[7] has to be produced before the judicial magistrate within 90 days; and if the offence is punishable otherwise i.e. with imprisonment for less than ten years, the challan has to be produced before the judicial magistrate within 60 days; if that does not happen, the detenue shall be released on bail as a matter of right- in legal parlance, this bail is known as 'compulsory or statutory bail under section 167 CrPC'. The concerns of legislature in this regard is clearly reflected from the fact that no discretion has been given even to the magistrate to release him or not if the police has not been able to furnish challan within the contemplated time period of 90/60 days as the case may be.

Undoubtedly, police custody is not the be-all and end-all of the entire process of investigation yet it may be the primary requisite especially when we are concerned with the investigation of henious crimes. But be that as it may, detention of people in custody is not favoured by law unless it is so justified. The scheme of section 167 CrPC focuses upon the protection of accused from overzealous and unscrupulous state officials through the interference of an independent judiciary. The process of arrest and thereafter arrestee's continuation in detention has always been a litmus test for rule of law in any state setup. All the above discussion unequivocally points towards the urgency and seriousness with which the law machinery especially judiciary has to keep a strict watch on the *ticking clock* ensuring that a person who has been arrested by state officials could be kept further in detention only through the process established by law which has been further interpreted as due process as observed above. It has been a consistent view of courts[8] that detention of a person is not a routine matter but it is an interference with one's personal liberty and those (read 'investigation/prosecution') who seek the custody or continuation of it must have to justify their such demand. Every moment of detention of a person has to pass not only the rigorous test as laid down by the statutory law but also it has to pass through Article 21 of the Constitution of India. If prosecution desires to interfere with the most fundamental right of personal liberty of a person and presses for his detention, it must have proper sanction for continuing with his custody for every single second.

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[6] This expression 'not less than ten years' means ten years or exceeding ten years. See Ratanlal&Dhirajlal, The Code of Criminal Procedure, Ed. 19, 2013, LexisNexis, p.655

[7] Police Report (of the investigation) under section 173 (2) presented to the judicial magistrate

[8] See e.g. Noor Mohd. V State (1978) 2 ILR 442 (Delhi High Court)

Judicial Conundrum about First Twenty Four Hours:

In this context it is surprising that there is a clear dichotomy in the observations of Supreme Court which astonishingly results in difference of detenue remaining in custody for no less than 24 hours if either of the two interpretations of Supreme court available in this respect is applied to the extension of detention under section 167 CrPC. According to one interpretation, the day on which the magistrate for the first time applies his mind i.e. when the person arrested is taken to him for the first time in a case within twenty four hours of his arrest as provided in section 57 or section 76 CrPC as the case may be, that day has to be *excluded* in calculating 60/90 days under section 167 CrPC; whereas according to the second interpretation, that day has to be *included* for such calculation. This dichotomy inevitably results in a difference of twenty four hours of detention which is hugely troublesome in the context of discussion held above wherein it has been clearly observed and felt how jealously our Constitution framers, our legislature and our courts guarded each and every moment of personal liberty of a person. When every moment of our personal freedom is so seriously taken by our policy makers, this difference of twenty four hours in the two methods of calculations as per these two different interpretations of section 167 by the Apex court raises equally serious concerns.

In a series of cases e.g. *Anupam J. Kulkarni's* case[9], *Chaganti Satyanarayan's* case[10] and *Bharati Chandmal Verma's* case[11] the Supreme court has observed that the day when for the first time the magistrate applies his mind after production of the arrestee before him for the first time, must be *included* in the calculation of 90/60 days under section 167 CrPC. On the other hand the Supreme Court in Rustam's case[12] and Ravi Prakash Singh's case[13] observing just opposite to the abovementioned held that the fist such day has to be *excluded*for calculating the days requisite for section 167 CrPC.

Let us take a hypothetical situation where say on 10th of March of a particular year, a person was arrested by police in relation to an offence punishable with upto seven years of imprisonment and the same day he was produced before a magistrate. His bail application was rejected and he was given in police/judicial custody from time to time. The challan was not filed by police against him and in these circumstances on 8th May he moves an application for grant of statutory bail under section 167 CrPC- as the offence alleged against him was punishable with imprisonment upto seven years so for getting such bail, the period of 60 days was applicable to him. This application deserves to be granted if we start the counting of 60 days right from 10th of March i.e. if we *include* that day in such calculation which is valid under one interpretation. But if we apply the other interpretation, his such application is liable to be rejected as the starting day i.e. 10th of March has to be *excluded* for such calculation.

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[9] CBI v Anupam J. Kulkarni (1992) 3 SCC 141
[10] ChagantiSatyanarayan v State1986 AIR 2130
[11] State v BharatiChandmalVerma (2002) 2 SCC 121
[12] State v Rustam (1995 Suppl) 3 SCC 221
[13] Ravi Prakash Singh v State (2015) 8 SCC 340

In *Rustam's* case *supra* the reason for *exclusion* of the day of first order under section 167 CrPC by the magistrate has been pegged upon section 9[14] and section 10[15] of General clauses Act, 1897. On the other hand, the reason for *including* the day of first order of magistrate under section 167 CrPC has been provided in *Chaganti's* case *supra* as, "Detention can be authorised by the Magistrate only from the time his order of remand under section 167 CrPC is passed. The earlier period when the accused is in the custody of a police officer under section 57 CrPC cannot constitute detention pursuant to an authorisation by the magistrate. It, therefore, stands to reason that the total period of 90 days or 60 days can begin to run only *from* the date of order of remand".

Clearly there is a dichotomy between the observations of different benches of the Supreme Court and it is of utmost importance for the sake of uniformity of law that this conflict must be quelled as soon as possible by an authoritative pronouncement of a Supreme court bench of appropriate strength. Without any such decision holding it either one way, the difference in decisions upon the valuable right of accused for statutory/compulsory bail under section 167 CrPC is inevitable and bound to happen because different courts would calculate 60/90 days according to the Supreme court decision cited before them or as per their own understanding.

Conclusion:

In my view, the interpretation which 'saves' this time period of twenty four hours for the accused must be preferred over the other one. This is more so when the entire scenario is seen from the perspective of legislature's purpose of introducing a fixed time frame for completion of investigation in a criminal case and the approach of judiciary in this context holding that every moment of detention of a person by the state officials must be legally justified in the eyes of an independent judiciary. Protecting *at least* the physical freedom of people is the core idea behind independence of judiciary from interference of other state agencies. Onus of filing challan after completing investigation within a fixed time is upon the police and so every interpretation which is in consonance of this approach has to be adopted. It is even otherwise a cardinal principle of criminal jurisprudence that if two interpretations are possible then the one which is favourable to the accused must be adopted. When a particular time period is chosen as a ceiling for filing challan by police and the general philosophy is to allow every moment of detention of accused in custody if and only if some

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[14] Commencement and termination of time- In any [Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word from and for the purpose of including the last in a series of days or any other period of time, to use the word'to'.

[15] Where, by any [Central Act] or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open: Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877 applies

justification has been supplied for the same by the prosecution, the inevitable result is that these twenty four hours of the accused must be saved and the day of first order under section 167 CrPC must also be *included* in calculating 60/90 days for the same. This is not only a matter of one more day of custody for accused but it may result in denial of his statutory bail under section 167 CrPC and his even further continuation in custody. Say for instance, if in the hypothetical example taken above, police files challan on 9th May then in that case if we *exclude* the first day of starting of his custody, the right of accused for statutory bail shall never arise *et al* which would have arisen if we would *include* that day. Ultimately, keeping in view the legislative intent and the entire scheme of legislation about ensuring expeditious investigation by police keeping a fixed time frame for submitting challan before magistrate and the failure therein resulting in accused getting compulsory/statutory bail under section 167 CrPC, the pressure must be on the investigation/prosecution who seek to take away the right of personal liberty of accused which is the most precious right guaranteed under Article 21 of the Constitution of India.

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POVERTY AS A VIOLATION OF HUMAN RIGHTS: EMERGENCE OF A NEW PARADIGM TO POVERTY REDUCTION IN INTERNATIONAL AND INDIAN PERSPECTIVE

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"Sustained poverty reduction requires equitable growth, but it also requires that poor people have political power. And the best way to achieve that in a manner consistent with human development objectives is by building strong and deep forms of democratic governance at all levels of society. This means ensuring that institutions and power are structured and distributed in a way that gives real voice and space to poor people and create mechanisms through which the powerful—whether political leaders corporations or other influential actors—can be held accountable for their actions".

-Mark Malloch Brown[2]

***Abstract*:** Poverty is a multi-dimensional phenomenon which goes beyond the realms of adequate income. It is viewed as a state of social, economic and political deprivation of people that excludes them to participate as equals in the development process. Human rights are inherent in all people. Everyone has the right to live in dignity and to participate fully in society. Poverty denies people these rights. The purpose of this paper is to support the argument that poverty is multidimensional and part of human rights concern. Under this perspective, the study is of non-fulfillment of human rights that can be counted as poverty, namely the human rights involved must be those that correspond to the capabilities that are considered basic by a given society. The objective of this paper is to examine right to poverty in the International and Indian context on human rights approach, issues, challenges and policies in poverty reduction. India being a welfare state the development policies is reflected via legislation and policies.

***Keywords*:** Poverty, Human rights, Constitution, Rule of law

Introduction:

The word poverty comes from the old (Norman) French word *poverte* (modern French *pauvrete*), from Latin *paupertas* from pauper (poor)[3]. Webster's Revised Unabridged Dictionary defines 'poverty', as the state of having little or no money and few or no material possessions. Poverty is a state or condition in which a person or community lacks the financial resources and essentials for a

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[2] UNDP'S Mark Malloch Brown Calls for Total Global Strategy to help Eradicate Poverty. (March7,2001) https://www.wilsoncenter.org/article/undps-mark-malloch-brown-calls-for-total-global-strategy-to-help-eradicate-poverty

[3] Omene Gladys, Poverty and its Effect on individuals in the society at large. Accessed at https://portal.abuad.edu.ng/Assignments/1593119601poverty_assignment.pdf. (Last visited 10.08.21)

minimum standard of living. Poverty means that the income level from employment is so low that basic human needs can't be met. Poverty has conventionally been defined in economic terms, focusing on individual and household, relative or absolute financial capacity. It is now generally recognized that poverty is multidimensional and not only defined by a lack of material goods and opportunities[4]. A human rights approach to poverty calls for a paradigm shift in how we understand and address poverty. Extreme poverty is the greatest denial of the exercise of human rights[5].Poverty erodes or nullifies economic and social rights such as the right to health, adequate housing, food and safe water, and the right to education. Poverty-stricken people and families might go without proper housing, clean water, healthy food, and medical attention. Each nation may have its own threshold that determines how many of its people are living in poverty.

The same is true of civil and political rights, such as the right to a fair trial, political participation and security of the person. Poverty denies people these rights. Specifically, poverty affects economic and social rights – those rights that relate to the workplace, social security, and access to housing, food, water, health care and education. When, as a society, we allow poverty to persist, we fail to protect these basic human rights.

Global Poverty has decreased in developed countries since the industrial revolution. Increased production reduced the cost of goods, making them more affordable. Advancements in agriculture increased crop yields as well as food production. As of 2015, an estimated 736 million people lived extreme poverty, which the World Bank defines as surviving on less than $1.90 per day. Of the total, roughly half lived in just five countries: India, Nigeria, Democratic Republic of Congo, Ethiopia and Bangladesh[6]. Since 1991, rural poverty is reduced by the upcoming of the urban growth and urban poverty in India is becoming more important relative to rural poverty. India's urban population is increasing, especially since 1990. From 1950 to 1990 i.e. during 40 years the urban sector's share of India's population only rose from 17% to 26%, but in the 15 years after 1990 it is projected to have risen to 29 percent. Urban growth obviously helps to reduce urban poverty directly. Urban areas are demand hub for rural producers, a place of employment for rural workers and increasingly a source of domestic remittances[7].

Rule of Law and Poverty:

The rule of law is an inspiring concept like Justice, Liberty, Equality and Fraternity and has several shades of meaning. The core idea was put across by

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[4]World Health Organization, "Human Rights, Health Rights, health and Poverty Reduction Strategies", Health and Human Rights Publication Series, Issue No 3, (December 2008)

[5] Mary Robinson, BBC News, Thursday, (November 21, 2002)

[6] The World Bank, Poverty._https://www.worldbank.org/en/topic/poverty." (Accessed July 25, 2020.)

[7] The World Bank, Perspectives on Poverty in India ,11 , Washington,DC, (2011)

Sir Edward Coke, Chief Justice of the common pleas in England in his reply to the question of King James I, whether the king himself could determine disputes, as the law was founded upon reason which he had as much as the Judges and others[8]. A.V.Dicey, in his *Introduction to the Study of the Constitution* attributed three meanings to the rule of law. In the first place, it meant absence of arbitrary power on the part of the Government. Next it meant that no man was above the law and every man, whatever be his rank or condition, was subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals i.e., equality before law or the equal subjection of all classes to the ordinary law of the land, administered by the ordinary courts. The third meaning given by Dicey was that the Law of the Constitution as not the source but the consequence of rights of individuals, as defined and enforced by the Courts[9].

The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated and equally enforced. It is fundamental to international peace and security and political stability to protect people's rights and fundamental freedoms. The rule of law requires that people can expect predictable results from the legal system and predictable results mean that people who act in the same way can expect the law to treat them in the same way. The Rule of law is by which originally conceived, is to make the state abide by the law so as to avoid arbitrariness and the government must exercise its function based upon pre-existing laws, and changes have to be pursuant to established legislative means on those currently working laws[10]. Rule of Law has also a tight relationship with the notion of development in respect of ensuring property rights, performance of contracts, and lessening of corruption[11].Poverty is an opposite of progress. It is usual that development is a basic right of human being. Thus, poverty is a refutation of one's basic human rights. Concerning this, the Human Development Report of 2000, argues that poverty reduction needs a successful realization of economic, social and cultural rights as well as civil and political rights. The report looks at human rights as an intrinsic part of development as a means to realizing human rights[12]. Observance of human rights is an ingredient of the rule of law. A remarkable apprehension of developed social order is the rule of law. Observances of the civil and political rights keep the society in a state of peace and tranquility and people get the opportunity of economic growth. On the other hand, observances

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[8] R.F.V.Heuston, Essays in Constitutional Law, 32-33, (Universal Law Publishing Co. 2nd Edn. 1999)

[9] Sir Ivor Jennings, The Law and the Constitution, 54 and 68,(University of London Press, Fifth Edition 1972)

[10] Rachel Kleinfeld Belton, Competing definitions of Rule of Law: Implications for Practioners, 3, (Carnegie Papers, Rule of Law series, No.55, Jan 2005.) www.Carnegie Endowment, last accessed

[11]Africajusticefoundation.org/our-blog-news-and-events/the-rule-of-law-in-the-post-2015-development-agenda/ https://www.grin.com/document/287041

[12] http://www.hdr.undp.org/en/content/human-development-report-2000

of the economic, social and cultural rights enable the state to achieve the continuous improvement of living conditions to take of the shoes of poverty[13].

Poverty can be defeated through the implementation of the rule of law thereby defeating economic growth of country. Rule of law and access to justice are fundamental amongst all which guarantee the entire rights and privileges. The countries that enforce the rule of law and protect individual rights are preconditions for broader social development in health, education and economic arenas of life. [14]. The rule of law is a core element of the humanitarian and human rights agendas and especially crucial to understand poverty .Legal empowerment is not viable whilst, *de jure* or *de facto*, underprivileged people are left with no entrance to a well-functioning justice system. Wherever ideal laws preserve and inflict civil liberties, constitutional privileges and commitments; the benefits and development to all, particularly for poor, are beyond measured[15]. Assuring fair access to justice, although elementary to steps forward, is tough to carry out under Report of the Commission on Legal Empowerment of the Poor, UNDP, Vol.1, 2008[16].

Human Rights Dimension of Poverty:

Poverty reduction is that norms that reduce and empower the poor to uplift with potentiality to poverty. It is now widely recognised that effective poverty reduction is not possible with the empowerment of the poor. The Preamble to the Universal Declaration of Human Rights, 1948, begins with recognition of the inherent dignity and of the equal and inalienable rights of the members of the human family as the foundation of freedom, justice and peace in the world. The definition and understanding of human rights leads to more adequate responses to the many facets of poverty that do not trample on rights in the pursuit of growth and development. It gives due attention to the critical vulnerability and subjective daily assaults on human dignity that accompany poverty[17]. Importantly, it looks not just at resources but also at the capabilities, choices, security and power needed for the enjoyment of an adequate standard of living and other fundamental civil, cultural, economic, political and social rights[18]. Indeed, no social phenomenon is as comprehensive in its assault on human rights as poverty. Poverty erodes or nullifies economic and social rights such as the right to health, adequate housing, food and safe water, and the right to education. The same is true of civil and political rights, such as the right to a fair trial, political participation and security of the person. This fundamental recognition is reshaping the international community's approach to the next generation of poverty reduction initiatives.

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[13]Taslima Khanam, "Rule of law approach to alleviation of poverty: An analysis on human rights dimension of governance", 22-32 IIUC Studies Vol.15, (Dec.2018)
[14] https://www.tandfonline.com/doi/full/10.1080/15570274.2014.976085
[15] https://www.banglajol.info/index.php/IIUCS/article/view/49342/37708
[16]https://www.un.org/ruleoflaw/blog/document/making-the-law-work-for-everyone-vol-1-report-of-the-commission-on-legal-empowerment-of-the-poor/#
[17] https:///www.ohche.org/EN/Issues/Poverty/DimensionOfPoverty/Pages/Index.aspx
[18] http://poverty-and-rightsblogspot.com/2007/04/

To deal with poverty as violation of basic human rights means taking some positive measures in the light of international standard of justice- which is concerned with the relations between the nations towards the objective of establishing a global society based on the healthy relations of human beings and where justice can be secured for all human being in true sense. Everyone living in that global society would enjoy and exercise absolute and inalienable rights- such as right to life, right to livelihood, right to minimum wage, right to education and all other rights which makes life meaningful. These rights are not only available to the citizens of some particular states or not depends upon the economic condition of a particular state, but universally to all human beings irrespective caste, creed, rich or poor, political identity etc. The principle of global justice thus can establish the conditions for a fair distribution of resources of the earth among its people in the light of certain basic and absolute rights and this can lead global justice possible. In order to reduce hunger and poverty, the role of the states should be to create and enhance the scope and opportunity of the earning source of the poor people on a permanent basis[19].

The Universal Declaration of Human Rights covers a wide variety of human rights, including a statement that no one shall be subjected to torture or cruel and inhuman treatment or punishment and so on. But tucked away practically at the end of the Declaration is Article 25, which reads as follows *"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood[20] in circumstances beyond his control."*

Poverty and International Law:

Poverty is today's world concern as well as national and international point of view. Poverty is a universal phenomenon not one country has been able to assert to be entirely unbridddled by it. The impulse of poverty on human existence can be touchstone from the fact that the United Nation designated 1996 as the International Year for the eradication of Poverty and 1997-2006 as the Decade for the Eradication of Poverty affirming that, "eradicating poverty is an ethical, social, political and economic imperative of humankind"[21]. In 1995, poverty marked as a foremost peril to the potential of human race in the World Social Summit held in Copenhagen. At the summit, participating states made three core commitments: firstly, to calculate approximately overall and acute income poverty; secondly, to put time-bound end and goals for the considerable diminution of overall poverty and the elimination of excessive poverty and

[19] "Reducing Poverty and Hunger: the Critical role of Financing for Food, Agriculture", available at: http://www.fao.org (Visited on 26/12/2016)
[20] https://www.unorg/en/universal-declaration-human-rights/
[21] G.A.Res.51/178,U.N.Doc.A/RES/51/178(February 11, 1997)

finally, to implement countrywide anti-poverty plans to reach their end[22]. With a focus on how trade, foreign investment, commercial arbitration and financial regulation rules affect impoverished individuals, Poverty and the International Legal System examines the relationship between the legal rules of the international law system and states' obligations to reduce poverty through the human aspects of global economic activity without resorting to either overly dogmatic human rights approaches[23].

International law has played an important role and has obtained added importance in the contemporary social order. International Law is so dynamic that it has expanded hugely during the twentieth and the beginning of the twenty-first century. International jurisprudence has acquired the maturity to understand that an effective international legal system is essential to ensuring peace, developing international co-operation and guaranteeing the sovereign rights of states and peoples. There is growing awareness amongst the States that the modern system of international law should meet the prevailing political, sociological, economical, scientific and technological environment and therefore the specialists from various disciplines must participate in the process of international law making process.

Since 1997-2006 it has been declared by the United Nations to be a decade for poverty alleviation thus far a large number of countries are poor. UN General Assembly in December 2007, announced the second United Nations Decade for the Eradication of Poverty for 2008-2017. Despite the fact of realizing the progress by this era, far-off the world's communities have gone at the back, still breathing in scarcity. They have no such protections and rights met by the law. So, this is not the want of resources or need of exertion that haul them back, but the reality that the resources and effort are unsafe, vulnerable, and far less prolific than they might be. Unauthorized narrow customs and institutions govern their lives and they are often exploited by it. As the deprived poor are in short of standard rights, they are bare to exploitation by the system that discriminate them. Such discrimination has massive consequences. And thus, people are barred from the rule of law[24]. On theoretical framework, specialized reports, and review of relevant literature, there is a persuasive indication that once destitute segment of the society are shielded under the protection of rule of law, they can flourish.

The study is undertaken with the objective of highlighting the relevant provisions and guiding principles of the ILO, UDHR and significant conventions and Declaration in connection with the right to work and issues relating to employment. Attempts have been made in the present study to evaluate the

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[22] Anyang Nyongo.P, "Governance and poverty reduction in Africa", Economic Research Paper No 68, African Development Bank (2001). file:///C:/Users/USER/Downloads/49342-Article

[23] Krista Nadakavukaren Schefer, Poverty and the International Economic Legal System, 1-36 (Cambridge University Press, 2013).

[24] Taslima Khanam, "Rule of law approach to alleviation of poverty: An analysis on human rights dimension of governance", 22-32 (IIUC Studies Vol.15, Dec.2018)

usefulness and benefits of these international initiatives to ensure the right to work and gainful employment opportunity. At the international level, the role of the United Nations has been to bring human rights to the centre of UN activities by what is known as the 'mainstreaming human rights'[25]. There are various ways by which international human rights law is enforced both at the national and international levels. The major purpose of UN is to achieve international co-operation and to develop friendly relations among the nations which are much required in order to solve the international problems of economic, social, cultural or humanitarian character and to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to religion, race, sex, caste, language or place of birth[26].

Taking into considerations these objectives, internationally recognized human rights laws which provide a normative framework within which national, community or village level poverty alleviations strategies and schemes can be framed. The implementation of this norm based frameworks help to create an environment where essential components of the anti poverty strategies, such as accountability, equality and non-discrimination, participation and empowerment, receive the persistent attention and these are the fundamental requirement for creating a healthy society.

Poverty Eradication and Human Rights:

Poverty is an assault on human dignity, but it also can reflect a violation of human rights when it's is the direct consequence of state policy or is caused by the failure of governments to act. A human rights approach to poverty reduction entails: ensuring that poverty analysis addresses the multiplicity of causes of deprivation, exclusion and discrimination of the poor ensuring that duty-bearers are identified with their obligations, also because the capacity gaps on why they're not meeting them. When explored the link between poverty and human rights, one must find approach as to which will better protect economic and social rights. Despite recognition within the Millennium Declaration of the importance of human rights, equality, and non-discrimination for development,

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[25] UNDP's work is based on the belief that people experience poverty not only as a lack of income but also as a lack of education or health care or as lack of dignity and participation in a community. These dimensions of people's lives are considered so important that Governments all around the world have acknowledged them as entitlements-as human rights- of their people both in international and in national law. So the fight against poverty in all its dimensions is not an act of charity but a matter of civil, cultural, economic, political and social rights for all people.
UNDP encourages countries in their efforts to ground their national development programmes and policies in human rights- often referred to as 'mainstreaming human rights' in particular by focusing on the principles of non-discrimination, participation and accountability. For details see "Mainstreaming Human Rights in Development Policies and Programmes: United Nations Development Programmes and Experiences", Availableat:http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/human_rights/mainstreaming-human-rights.html (Visited on 20/12/16)

[26]https://www.cambridge.org/core/books/poverty-and-the-international-economic-legal-system/poverty-and-international-law/

the Millennium Development Goals (MDGs) largely bypassed these key principles[27].The fundamental human rights guarantees of equality and non-discrimination are legally binding obligations and don't need instrumental justifications. That said there's a growing body of evidence that human rights-based approaches, and these key guarantees in especially, can cause to more sustainable and inclusive developmental results.

The post 2015 framework should be grounded during a fundamental guarantee of equality and non-discrimination. Under law of nations, this needs states to spot and eliminate discrimination and ensure equality. This may require legislative or administrative reform to repeal discriminatory provisions or address discriminatory practices by the govt. or private actors, a change in resource allocation, or educational measures[28]. The post 2015 framework should embody the responsibility of states, when acting together or alone, to require proactive measures to identify and address entrenched discrimination, both direct and indirect. It should embody the responsibility of states, international institutions, and corporations to avoid and remedy discrimination that they're directly or indirectly responsible. The framework should go how toward achieving this by including goals, targets, and indicators directed at reducing discrimination and ensuring that the social and economic needs of the most marginalized communities are being addressed fairly, and at reducing wealth inequalities more broadly. Eradicating extreme poverty and substantially reducing moderate poverty by 2030 requires major shifts in policy priorities. To ensure that nobody is denied universal human rights and basic economic opportunities, any new development agenda should specialize in ensuring inclusive economic growth and reducing inequalities[29].

Poverty has declined worldwide, but progress has been uneven. Extreme poverty is mainly concentrated in rural areas. Poverty can't be eradicated without addressing the pervasive inequalities in incomes and economic opportunities between and within countries, between rural and urban areas, and between men and women. Reducing such inequalities will need to start with improving access for the poor to productive resources, basic services and social protection. The silver lining is that India has halved its poverty rate since the 1990s and achieved annual growth exceeding seven per cent over the last 15 years. In the ten-year period between 2005-06 and 2015-16, approximately 271 million people moved out of poverty. As per the World Bank's Poverty Clock, on the brink of 44 Indians escape extreme poverty every minute. India, as a member State of the United Nations, has adopted the Sustainable Development Goals (SDGs).The primary goal is to end poverty by the year 2030.

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[27] Navaneetham Pillay, The Millennium Development Goals and Human Rights, UN High Commissioner for Human Rights. https://www.ohchr.org/EN/Issues/SDGS/Pages/MDGIndex.aspx

[28] T.Sita Kumari, "Right to work as a Human Right and Rural Employment Guarantee Act, 2004", 92-97,(Nyaya Deep, Volume VIII Issue 4. Oct., 2007).

[29] http://www.fao.org/sustainable-development-goals/overview/fao-and-the-post-2015-development-agenda/poverty-eradication/en/

India has pledged to '**Leave No One Behind**' and has committed to fast-track progress for those furthest behind first. Unfortunately, the recent statistics make grim reading. As per the NITI Aayog's Sustainable Development Goals Index 2019, more Indians have fallen into poverty, hunger and income inequality within past two years[30]. Poverty s so deeply entrenched in many societies that it is unrealistic to hope that even with the best of intentions it can be eliminated in a very short time. Equally, one must accept the truth that it's going not be possible to fulfil all human rights immediately. Since the realisation of most human rights is at least partly constrained by the availability of scarce resources, and since this constraint cannot be eliminated overnight, the human rights approach explicitly allows for progressive realisation of rights. The National Human Rights Commission is thus of the view that starvation constitutes a gross denial and violation of the basic right to be free from hunger. Holding 'misgovernance' resulting from acts of omission and commission on the a part of public servants, to be the rationale for starvation deaths occurring in several parts of the country, the Commission has stated that these are an instantaneous concern of the NHRC under the provisions of the Protection of Human Rights Act, 1993[31]. The National Human Rights Commission has observed that universally there is a demand that every effort be made by the State and by civil society to eradicate the poverty and hunger that constitute an affront to the dignity and price of the human person. Given the circumstances of our country, India features a special responsibility during this regard. The prevalence of utmost poverty and hunger is unconscionable during this day and age, for not only does it militate against respect for human rights, but also undermines the prospects of peace and harmony within the State. For this the Commission will still be deeply involved this issue within the future too.

Constitutional responsibilities towards reduction of Poverty:

India is considered as the welfare state and largest democracy of the world with a detailed written constitution. The Constitution of India envisions social justice because the arch to ensure life to be meaningful and liveable with human dignity. The Preamble of the Constitution has used the terms like "Socialist", "Social and Economic Justice", "Equality" etc, these terms indicates that the state would extensively involve in social welfare of people, and would attempt to establish an egalitarian society. In a developing country like India, law is catalyst and Rubicon to the poor to reach the ladder of social justice[32]. The people in India have been considered as the supreme authority in our country, as it is declared by the Preamble of Indian Constitution that sovereignty vests not in the Parliament but in the people of Union of India. Moreover a separate chapter of Directive Principles of State Policy has been devoted towards the welfare responsibilities of the government, which lays down the norms of ideal governance for people's welfare. The current economic policies of the government, which are largely influenced by globalization and capitalism, aren't

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[30] https://indiacsr.in/eradication-of-poverty-is-a-constitutional-guarantee/
[31] https://nhrc.nic.in/press-release/freedom-hunger-fundamental-right-nhrc
[32] Lucy Williams, Asbjorn Kjonstad, et.al (eds.), Law and Poverty: the Legal System and Poverty Reduction, 165-168, 2003, (Zed Books Ltd., London, 2003).

in conformity with its welfare obligations. Under the Indian Constitution the scheme for the social welfare is reflected in several provisions of the constitution. They are ---

Socialist State: The Preamble of the Constitution of India declares India as a socialist[33] country, and this term itself gives a considerable proof of the existence of social welfare responsibilities of the government. The Supreme Court of India in the case of *D S Nakara v. Union of India*[34] made the following observation with regard to socialism- *"*The principal aim of a socialist State is to eliminate inequality in income and status, and standard of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave". A socialist state strives to achieve many ideals, some of them are- Equality of opportunity for employment, Equal pay for equal work, initiation of schemes concerning to health, education, social security, and other such essential matters

Social and Economic Justice: The Preamble of our Constitution uses two other concepts which create responsibilities on the state to involve actively in social welfare, namely "social" and "economic justice". Under the concept of social justice the state is required to ensure that the dignity of socially excluded groups is not violated by the powerful[35], and they are considered on equal footing with others. It was said by the Supreme Court in the case of *Consumer Education and Research Centre v. Union of India*[36]*, "Social justice, equality and dignity of person are cornerstones of social democracy. The concept 'social justice' which the Constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen."*

Under economic justice it is contemplated that the state would not make any distinction among its citizens on the idea of their possession of economic resources. Economic justice also requires the state to undertake to narrow down the gap of resourceful and poor by distributive justice in terms of income and wealth. To achieve the ideals of social and economic welfare the state is required to involve in different social welfare schemes as like reservation for SC/ST/OBCs, MGREGA, Mid Day Meal Scheme, Sarva Sikha Abhiyan, etc. India as a welfare state is committed to the development of its people. The constitutional responsibility is reflected via legislations and development policies. It is now realised that a collaborative measure of emphasis on accelerated growth and

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[33] The word socialist was not there in the Preamble at the time of adoption of constitution of India at 26 November, 1949, but it was added by the 42nd Constitutional Amendment in 1976.

[34] AIR 1983 SC 130

[35] As like in the name untouchability, (Untouchability is abolished and its practice is forbidden by Article 17 of Indian Constitution), class superiority, rituals, etc.

[36]AIR 1995 SC 922

direct interventionist safety net procedure is that the proper approach to optimize the control strategies[37].

Poverty and Fundamental Right: In a recent direction to the State Governments and therefore the Central Government, the National Human Rights Commission has held that there is a fundamental right to be free from hunger. The Commission has taken the view that the Right to Food is inherent to a life with dignity[38]. Article 21 of the Constitution of India guarantees a fundamental right to life and personal liberty. The Constitution thus makes the Right to Food a guaranteed Fundamental Right, which is enforceable under Article 32 of the Constitution. The Indian Supreme Court has already treated the various facets of poverty such as the right to food, shelter, etc. as a neighbourhood of the elemental and fundamental right to life under Article 21 of the Constitution and this has enabled the Courts to enforce these rights. The Government would be violating the right to life under Article 21 if it weren't to require concrete steps for the aim of rescuing that section of the population suffering grievous poverty from its tentacles.

Directive Principles of State Policy: Part IV of the Indian Constitution deals with the Directive Principles of State Policy. These directive principles are most glaring examples of the scheme of social justice in our constitution, and these principles anticipate a lot of provisions for the welfare of people at large relating to education, environment, promotion of justice, free legal aid, living wages, protection of marginalized groups, forest and wildlife, etc. The government is required to take all possible measures for the fulfillment of directive principles in its economic capacity. Article 21[39] should be read with Articles 39(a) and 47 which underscores the character of the obligations of the state so as to make sure the effective realization of this right. Article 39(a) of the Constitution direct its policies towards securing that all its citizens have the right to an adequate means of livelihood, while Article 47 spells out the duty of the State to raise the extent of nutrition and standard of living of its people as a primary responsibility. Some of the directive principles are: Article 39(a)[40], Article 39 (A)[41], Article 41[42] , Article 42[43] and Article 45[44].

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[37] Vikrant Narayan Vasudeva, "Legal Intervention in poverty alleviation: Enriching the poor through the law", 447-463, (NUJS Law Review, Oct-Dec, 2010).

[38] Supra note 32

[39] No person shall be deprived of his life or personal liberty except according to procedure established by law.

[40] The state shall direct its policy towards securing adequate mean of livelihood to man and woman.

[41] The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[42] The State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Though the term 'poverty' has not been mentioned in the Indian Constitution, the Preamble, the Fundamental Rights and the Directive Principles of state Policy, it stands substantiation for a welfare state model. After observing the success of guaranteeing rural wage labour under the poverty alleviation schemes, the National Commission to Review the Working of the Constitution proposed a constitutional obligation on the State to provide to the citizens 'Rural Wage Labour' as a Fundamental Right and proposed the introduction of a new Article 21B[45] for this purpose[46]. The Indian Constitution does not recognize Right to Health as a fundamental right although some provisions of the Directive Principles of State Policy are directly or indirectly related to public health. Article 38 imposes liability on the State to secure a social order for the promotion of welfare of the people which cannot be achieved without Right to Health. Article 39(e) is related to protection of Health of workers and article 39(f) provides that children are given opportunities and facilities to develop in a healthy manner. Article 42 provides to protect the health of infant and mother by maternity benefit. Article 47 spells out the duty of the State to raise the level of nutrition and the standard of living of its people and the improvement of public health[47].

Poverty and corona virus pandemic 2020

Latest estimate from the International fund (IMF) reports and monetary Monitor: Policies for the Recovery, October 2020, shows that 90 million people globally would slip into "extreme poverty" (surviving on $1.9 a day) due to the pandemic. This is in line with the planet Bank's June 2020 estimate ("Projected poverty impacts of COVID-19") which estimated 70-100 million to slide into extreme poverty[48].The corona virus pandemic and national lockdown since March 25, 2020 has unleashed an unprecedented medical, social and economic catastrophe. The whole country has been during a state of forced inactivity. Businesses are shuttered, jobs and incomes are lost and a humanitarian crisis within the sort of tens of millions undertaking reverse migration, moving from their places of labour in cities to their native villages. This crisis has further exacerbated the already weak and falling economic process over the last several

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[43] Provision for just and humane conditions of work and maternity relief: The State shall make provision for securing just and humane conditions of work and for maternity relief.

[44] The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years

[45]"21B. The State shall provide a mechanism for protection of the health of all Indian citizens which includes prevention, treatment and control of diseases as well as access to free of cost or affordable medical treatment, diagnosis and essential medicines in such manner as the State may, by law, determine."

[46] National Commission to Review the Working of the Constitution, A Consultation Paper on Social Security and Employment,(September 26, 2001) available at http://lawmin.nic.in/ncrwcc/finalreport/v2b1-6.htm (Last visited on Nov21,2010)

[47] Bill No. VII of 2018, THE CONSTITUTION (AMENDMENT) BILL, 2018 As introduced in the Rajya Sabha on the 20TH JULY, 2018

[48] World Economic Outlook: A Long and Difficult Ascent, October 2020. Accessed on 24.10.20. https://www.imf.org/en/Publications/WEO/Issues/2020/09/30/world-economic-outlook-october-2020

quarters. Income and job losses mean millions are joining the ranks of the poor. Government must provide a safety net for those on the brink[49] .

Tens of many families in several regions of the country face the *spectre* of poverty. The data, released by the United Nations Development Programme (UNDP) and therefore the Oxford Poverty and Human Development Initiative (OPHI), shows that 65 out of 75 countries studied significantly reduced their multidimensional poverty levels between 2000 and 2019[50] . The Indian economy too is sliding into negative territory. Furthermore, the Covid-19 pandemic and therefore the resulting lockdown measures, which were necessary to curb the rapid spread of the virus, has thrown many people across the planet into poverty. While data remains awaited, the pandemic could have potentially undone the progress that has been achieved thus far. It is therefore all the more necessary for proactive efforts on the part of Governments, large corporations and every one influential stakeholder to adopt policies that might end in the upliftment of the poorest. India's per capita rate of growth in real GDP is already low, and is probably going to worsen.

Three countries like Nigeria, India and Congo are home to quite a 3rd of the world's poor. India may even see larger increase within the number of poor as results of Covid-19. So, 2021 goes to be a particularly challenging year not just for governments and businesses but also for those on the borderline of poverty. Governments and central bankers round the world have announced massive stimulus packages and ultra-loose monetary policies. However, these policies need to be implemented appropriately to maximize the specified outcomes. Structural imbalances that have developed in recent months mean the recovery is probably going to be painfully slow As India plans to further ease lockdown restrictions after May 31, experts say that a minimum of 10 crores poor Indians are getting to be pushed below the earth Bank-determined poverty level of $3.2, which is slightly above Rs 240.A Bloomberg report quoting Ashwajit Singh, director of IPE Global, suggests that the share of poverty-stricken people within the country could rise from 60 per cent to 68 per cent. Noted economists like Nobelist Abhijit Banerjee, senior Congress leader P Chidambaram and former RBI governor Raghuram Rajan agree that India's poor face the foremost important crisis of their lives and therefore the government should provide direct cash relief to help them.[51].

Multiple studies are warning that the pandemic-induced depression would have a cataclysmic impact on the poor globally and be particularly severe in India home to the utmost number of poor people sending millions back into poverty. Eight months into the lockdown, estimates are getting more definitive, though, with a caveat that things could worsen if the pandemic becomes more

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[49] THE HINDU Bussiness June 15, 2020

[50] https://www.business-standard.com/article/current-affairs/at-273-mn-india-recorded-largest-reduction-in-poverty-over-10-years(Last visited Dec 20,2020)

[51] https://www.indiatoday.in/business/story/coronavirus-impact-india-poor-population-poverty-unemployment-hunger-economic-crisis-recession(Last visited Dec 12,2020)

severe[52]The Indian government is facing a unprecedented challenge to guard over a billion densely packed people, but ramped-up efforts to stop the spread of the corona virus in India need to include rights protections," said, Meenakshi Ganguly, South Asia director at Human Rights Watch. "Authorities should recognize that malnourishment and untreated illness will exacerbate problems and will make sure that the foremost marginalized don't bear an unfair burden from lack of essential supplies. The authorities in India should take all necessary steps to make sure that everybody has access to food and medical aid , which the poor and marginalized aren't mistreated or stigmatized[53]. The Indian government's responsibility to guard its people from the outbreak shouldn't come at the value of human rights violations.

Conclusion:

The rising incidence of unemployment and under-employment, which is the primary cause of rural poverty, is altering the urban landscape of the region .The central goal of the post 2030 development agenda is to eradicate poverty and still continues to be a major challenge and thus will need to remain. For this it requires major shifts in policy priorities. The poor have few decent work opportunities, as most live in areas where productivity is low, local economic activity is inadequately diversified, underemployment rates are high and jobs are insecure. Poverty pushes many children into the labour market. Almost 60 percent of child labour worldwide is found in agriculture, where children often work in hazardous conditions, putting children's health, education and life chances in danger. The object is to ensure that no one is denied with universal human rights and basic economic opportunities, any new development agenda should focus on ensuring inclusive economic growth and reducing inequalities.

Government has introduced a variety of anti-poverty programs since independence to alleviate poverty. These include various employment guarantee programmes like National Rural Employment Programme; Rural Landless Employment Guarantee Programme etc.[54]Recently, Government has initiated National Rural Employment Guarantee Program (NREGP)[55]. As per NREGP, the Government will provide 100 days of employment per year to whosoever is willing to work. NREGP is taken into account as a landmark program in poverty alleviation measures. In today's time it seems that the policies of State aren't in conformity with the obligations of a welfare state. By taking pro-corporate stand,

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[52] Rebooting Economy 41: India's growing poverty and hunger nobody talks about. Business Today November 2, 2020

[53] https://www.hrw.org/news/2020/03/27/india-covid-19-lockdown-puts-poor-risk

[54] This was the totally centrally financed programme introduced in 1983; the entitlement of each Sate to the Central fund was based on the incidence of poverty and the population to agricultural labourers, marginal farmers and marginal workers with 50 percent weightage to each.

[55] National Rural Employment Guarantee Program No.42 later renamed as the Mahatma Gandhi National Rural Employment Guarantee Act of 2005 (MGNREGA) is an Indian labour law and security welfare measure that aims to provide 100 days work and enhance the livelihood security of the people in rural areas. The objective of the Act is to create durable assets and strengthen the livelihood resource base of the rural poor.

and neglecting the plight of the people, the state is derogating from its constitutional responsibilities of making an egalitarian society and providing social and economic justice. It has to be remembered that people aren't just means to realize higher economic process, but they're ends in themselves; every policy of government must put the people at the centre of it as beneficiaries.

Employment opportunities need to be generated, according to the decent work agenda. As the overwhelming majority of poor people live in impoverished rural areas, the main focus must be on building more productive, diversified and resilient local rural economies with stronger rural-urban economic linkages, and through the accelerated adoption of climate-smart and sustainable production methods. The question lies as to how poverty can be eradicated. The answer is human rights approach to poverty reduction and that can be achieved through the process of sustainable human development, promoting and protecting the human rights of people living in poverty. The eradication of utmost poverty, reduction of inequalities and fostering inclusive growth are achievable with sound legislation, policies and programmes with adequate budget and oversight to enhance the livelihoods and resilience of the poor. The participation of parliamentarians in poverty reduction measures is significant because parliament has the role of approving laws and budgets, providing a legislative basis and resources for policy implementation and holding the executive to account for its actions and inactions in various areas concerning poverty reduction and food and nutrition security.

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PAUPER SUIT AND SOCIAL JUSTICE: AN INTROSPECTION

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Abstract: The Indian Constitution, in addition to the justice provided to the society by the judicial organ, makes the provision to free legal assistant to all of those who are economically venerable with due care and tries to let them reach at justice provided despite the economic conditions of the individuals. Through procedural laws social justice to poor has been secured. Code of Civil Procedure, 1908 is one of them wherein by pauper suit procedure, access to justice and social justice to indigent has been provided. However there are few rules which create a sort of hindrance in the path of social justice. This paper analyses the concept of social justice in pauper suit procedure and hindrances over there.

Keywords: Pauper suit, Indigent person, Social justice, and Access to justice.

Introduction:

Preamble of the Indian Constitution declares Justice Social, Economic and Political to all. Social Justice is the cornerstone of the Constitution. Even before in Pre Constitutional era social justice was prevalent in Indian society. One can have a glance over the conception of Ram Rajya which was one of the pioneer kingdom in India devoted for social justice. Apart from Ram Rajya, we had too many ideal kingdoms whose contribution were lot more in the implementation of social justice. Although social justice in the constitution is the reflection of Positive School but the concept was very much flourished during the regime of Natural Law. Moreover the ideal of social justice as enunciated by the Constitution has been implemented in India by various legislative means and Order XXXIII of the Code of Civil Procedure, 1908 is one of them, which provides for filing of suits by indigent persons, who are unable to pay the court fees and allows them to institute suit without payment of requisite court fees. Legally speaking, a plaintiff suing in a civil court is bound to pay court fees as prescribed under the law at the time of presentation of plaint. Provisions of indigency exempt such person from paying the court fees at the first instance and allows him to institute suit without payment of court fees provided they fulfil the fundamental requirement as provided by the law.

The basic object of this research article is to discuss the rights, obligations and responsibilities of a pauper person and critical overview of the problem of filing suit as an indigent person and also to critically analyse the challenges faced by indigent person in access to justice

Who is an indigent Person?

A person is said to be pauper-[1]

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1. If he do not have sufficient means to enable him to pay the court fees prescribed by the statute for the time being in force for the plaint in such suit.
2. If no court fees is provided, when he is not entitled to property, the value of which worth one thousand rupees.

In both the cases, the property exempt from attachment in execution of a decree and the subject matter of the suit should be excluded. Any property acquired by the applicant after the presentation of the application for the permissions to sue as an indigent person and the decisions thereon should also be taken into consideration for deciding the question whether the applicant is an indigent person. The Hon'ble Supreme Court in *Union Bank of India v. Khader International Construction*[2] discussed the definition of an indigent person. It was observed that:

> "An indigent person is one who is not possessed of sufficient amount (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaintiff in such a suit. In case no such fee is prescribed if such person is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree and the subject matter of the suit he would be an indigent person".

The 240th Law Commission Report stated as under:

> "A litigant, who starts the litigation, after some time, being unable to bear the delay and mounting costs, gives up and surrenders to the other side or agrees to settlement which is something akin to creditor who is not able to recover the debt, writing off the debt. This happens when the costs keep mounting and he realizes that even if he succeeds, he will not get the actual costs. If this happens frequently, the citizens will lose confidence in the civil justice ."

It is not that the apex court is not aware of these situations, it is. In *Vinod Seth v. Devinder Baja*j[3], the apex court observed, under no circumstances, costs should be a deterrent to a citizen with a genuine or bona fide claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts.

Similar views were stated in *Ashok Kumar Mittal v. Ram Kumar Gupta*[4] wherein it was discussed that due to lack of provisions governing costs has ensued in an increase in frivolous suits. Also stated, following Alternate Dispute Resolution Mechanism will likely fail in absence of the provisions governing costs.

There has been unapproachable to access justice. The pendency of the suits, costs, complexities, lack of consciousness has crippled the legal system. Many

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[1]Order XXXIII Rule 1, CPC, 1908
[2] Judgement delivered by the Apex court on 5th May 2001
[3] (2010) INSC 441
[4] [2009] INSC 28

people are still in a dilemma that there is no availability of justice to them in respect to how the law and legal system works. For them, the law remains a mystery and justice remains invisible.

Therefore, given the above statements, yes, the cost of litigation undeniably acts as a hindrance or the barrier to access to justice.

Procedure to submit application to sue as an indigent person

Every application for permission to sue as an indigent person should contain the particular required in regard to plaint in sent, a schedule of movable and immovable property and estimated value thereof.[5] Such application is liable to be rejected if it does not comply the essential conditions prescribed under Rule 5 of Order XXXIII CPC, 1908.

Where an application to sue as an indigent person is granted, it shall be deemed to be a plaint is the suit and shall proceed in the ordinary manner except that the plaintiff will not have to pay court fees or process fees.[6]

Cost of Litigation: A Hindrance to Access to Justice:

Under Article 39A of the Constitution, the state shall ensure that justice is promoted on an equal footing by it service and, in particular, grants free juridical assistance, by appropriate laws, to ensure that there are no economic or other disability resources available for any person to achieve justice. Article 14 and 22 also makes it mandatory to ensure equality before the law and to uphold justice. Although cost shall follow the event is the celebrated principle of the Code of Civil Procedure even then Order XXXIII Rule 1 provides for a suit filed by indigent person. The provision encourage and enable poor people, without payment of any court costs, to initiate and prosecute suit. The order waives the court charge at first instance and allows them to prosecute their suit. The order waives the court charge at first instance and allow them to prosecute their suit in forma pauperis if certain condition are complied with. Even then there are too many good provisions in this orders which ensure social justice to poors but researcher has some view points in the paper wherein access to justice has been denied by this order.

Denial of Social Justice and Access to Justice:

1. *Determination of indigency*[7] –The formula to determine indigency under the code is an objectionable provision. Because the term "sufficient means" is nowhere been defined under the order and also property worth one thousand rupees is not acceptable in 21st century.
2. *Costs where Indigent person Succeeds*[8]-Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person; such amount shall be recoverable by the State

[5]Order XXXIII Rule 2, CPC, 1908
[6]Order XXXIII Rule 8, CPC, 1908
[7]Order XXXIII Rule 1, CPC, 1908
[8]Order XXXIII Rule 10, CPC, 1908

Government any party order by the decree to pay the same and shall be a first charge on the subject-matter of the suit.

3. *Procedure where indigent person fails*[9]–Where the plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed,-
   a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service or to present copies of the plaint or concise statement, or
   b) because the plaintiff does not appear when the suit is called on for hearing, the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person.
4. *Where indigent person's suit abates*[10]-Where the suit abates by reason of the death of the plaintiff or of any person added as a co-plaintiff, the Court shall order that amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person shall be recoverable by the State Government from the estate of the deceased plaintiff.
5. *Recovery of amount of court fees*[11]–Where an order is made under rule 10, rule 11 or rule 11A, the court shall forthwith cause a copy of the decree or order to be forwarded to the Collector who may, without prejudice to any other mode of recovery, recover the amount of court-fees specified therein from the person or property liable for the payment as if it were an arrear of land revenue.

Conclusion:

We, being the pioneer ideal Kingdoms from centuries together , have taken care of social justice and access to justice to poor. Kings in India used to leave the kingdom for the wellbeing of the subjects. Indigent suit under CPC, 1908, a step ahead in this regard. Various rules of order XXXIII provides procedure to access to justice and ensure social justice to poor persons, but there are few procedures which are discussed above in this research paper are hindrances in path of access to justice to indigent individuals. Order XXXIII Rule 10, 11, 11A, 12, 13 and 14 are fail to ensure social justice to indigent person and also formula to determine indigency under Rule 1 of Order XXX III CPC, 1908, is also defective which must be taken care of by the Legislature of the country.

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[9]Order XXXIII Rule 11, CPC, 1908
[10]Order XXXIII Rule 11A, CPC, 1908
[11]Order XXXIII Rule 14, CPC, 1908

SIXTH SCHEDULE OF THE CONSTITUTION OF INDIA AND ITS OPERATION: AN ANALYSIS

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Abstract: The Constitution envisages a special system of administration for certain areas designated as 'scheduled areas' and 'tribal areas'. The Fifth Schedule of the Constitution deals with the administration and control of scheduled areas and scheduled tribes in any state except the four states of Assam, Meghalaya, Tripura and Mizoram. The Sixth Schedule of the Constitution, on the other hand, deals with the administration of the tribal areas in the four north eastern states of Assam, Meghalaya, Tripura and Mizoram. In these four States the Constitution establishes Autonomous District Council which is both administrative as well as legislative body. The Law made by Parliament and State Legislature in respect of which the District Council or Regional Council has power to make the law, shall not apply unless District Council or Regional Council direct so on.
Keywords: Sixth Schedule, Scheduled Tribes, Administration, Autonomous Areas, Self-Governance, District Council, Regional Council.

Introduction:

India is a country with diverse cultures. Most of the regions are following uniform or somewhat similar lifestyles but there are certain regions in the country which are still not running parallel to the rest of the country. The people of these areas still hold their roots to their own culture, system of administration, customs, traditions, lifestyle and they follow their own law. When the Constitution of India was being drafted by the Constituent Assembly, the members were well aware of the entire scenario of these areas and thus a thorough study was made as regards the feasible option for governance of these areas and its people. Upon analyzing the situation and taking the opinion of the people concerned, a system for self-administration of these areas was introduced. This system was introduced under Article 244 of the Constitution of India and to give effect to the said Article, Schedules were added to the Constitution. The said Schedules are Schedules V and VI of the Constitution of India which relate to the administration of the scheduled areas and tribal areas of the country. Schedule V of the Constitution of India applies to all the scheduled areas of the country as notified by the Government except those situated within the States of Assam, Meghalaya, Tripura and Mizoram. So far as the scheduled and tribal areas situated within Assam, Meghalaya, Tripura and Mizoram are concerned, the Sixth Schedule has been introduced in the Indian Constitution. The Sixth Schedule provides for a mechanism of self-governance of the scheduled areas within the autonomous districts of these States. This paper aims to discuss the various provisions of the Sixth Schedule of the Constitution by tracing back to the historical development of the same.

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For this purpose, the Constituent Assembly Debates and the judicial view relating to the provisions has also been taken into consideration. The methodology that has been applied to discuss the paper is doctrinal based on primary and secondary sources.

Historical Background and Constituent Assembly Debates:

The beauty of India is India is unity in diversity. Most parts of the country follow similar systems and are more or less assimilated so far as their culture and civilization is concerned. However, there are some States where the lifestyle, culture, traditions, acceptance of beliefs, etc. varies. Some of these States are the States situated in the North-Eastern part of India. The tribal people of this region have their own laws which are different from the rest of the country. For example, in the State of Meghalaya, matrilineal system of family is followed. This aspect can best be understood in the words of Dr. B.R. Ambedkar which reads as follows:

> *"The tribal people of Assam differed from the tribals of other areas. As for the latter, they were more or less Hinduised, more or less assimilated with the civilization and culture of the majority of the people in whose midst they lived. As for the former, their roots were still in their own civilization and their own culture. They had not adopted either the modes or the manners of the Hindu who surrounded them. Their laws of inheritance, their laws of marriage, custom, etc. were quite different from that of Hindus. He felt that the position of the Tribals of Assam was somewhat analogous to that of the Red Indians in the United Sates who are the Republic by themselves in that country, and were regarded as a separate and independent people. He agreed that Regional and District Councils have been created to some extent on the lines which was adopted by the United States for the Purpose of the Red Indians."*[1]

Keeping in mind the abovementioned scenario and the vulnerability of the tribal people of the hills, a committee was constituted by the Constituent Assembly on 27th February, 1947. In order to assist this Advisory Committee, two more Sub-Committees were constituted, viz., North East Frontier (Assam) Tribal and Excluded Areas Sub-Committee and the Excluded and Partially Excluded Areas (other than Assam) Sub-Committee. The main role of these Sub-Committees was to work under the Advisory Committee and to address the issues of Fundamental Rights, Minorities and Tribal and Excluded Areas. The Sub-Committee was popularly known as Bordoloi Committee since it was chaired by Shri Gopinath Bordoloi, a renowned and knowledgeable person with respect to the affairs of the North-Eastern Region. The other members of the Committee were Shri J.J.M. Nichols Roy, Shri Rup Nath Brahma, Shri A.V. Thakkar and Shri Mayang Nokcha who was later replaced by Shri Aliba Imti.[2]

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[1]Dkhar, Umeshwari, "Dispensation of Justice in Khasi Hills Autonomous District Council", accessible on http://hdl.handle.net, 10603/311416 visited on 25-05-2021

[2]Hansaria Vijay, *"Justice B. L. Hansaria's Sixth Schedule to the Constitution of India*, Universal Law Publishing Co., Delhi,2016, p. 7

The Advisory Committee members met the community leaders in order to ascertain their view points about future administration of their respective areas. After due analysis of the prevailing situation, the Sub-Committee headed by Shri Gopinath Bordoloi submitted an elaborate report along with a Draft Sixth Schedule to the Chairman of the Advisory Committee, Shri Ballabhbhai Patel. The report elaborately dealt with the various aspects with regard to administration of the tribal areas. The said report along with the Draft Schedule, including the minor amendments made by Shri B.R. Ambedkar, was placed before the Constituent Assembly for further discussion.[3]

During the debates on the Draft Sixth Schedule, different members had different views. One viewpoint was of Shri Brajeswar Prasad of Bihar who said that the provincial Government or the Governor should not be responsible for the administration of these areas. They should be administered by the Central Government or the President. The reason behind this argument was the conflict between different classes of people staying in this region and also the infiltration in these areas. To this effect, he had proposed certain amendments but the same were not accepted.

Another aspect of argument put forth before the Constituent Assembly bu few members that more power should have been bestowed upon the Provincial Government than the District Councils. They were of the view that grant of too much autonomy to the District Council would lead to creation of "Tribalstan". Shri A.V. Thakkar, who was also a member of the Sub-Committee, stated that the idea of autonomous district was the only proposal which was found acceptable not only to the Committee but also to the various tribes, though when he had first heard about this proposal he was himself surprised because this had never existed anywhere in any part of India. According to Shri Nichols Roy, the measure of self-government will make the tribals feel that the whole of India is sympathetic with them and nothing is going to be forced on them to destroy their feeling and culture. He asked why should the tribals not be allowed to develop themselves in their own way. He reminded that to keep the frontier safe, these people must be kept in a satisfied condition. If force were to be used on them, more harm would be done as no advancement can come through force.[4]

As the Constituent Assembly debated the draft by taking up each paragraph, it became apparent that the proposals of the Sub-Committee which had been accepted by the drafting committee were going to be approved. Above all, it was the views of Dr. Ambedkar which carried the greatest weight. After heated arguments and discussions on the Draft Sixth Schedule, a number of amendments were made and finally adopted. Even after adoption of the Sixth Schedule, a number of amendments have been made thereto by the Parliament.

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[3] Ibid, p. 8
[4] Ibid, pp. 8-10

Analysis of the Provisions of Sixth Schedule:

The Sixth Schedule to the Constitution of India applies to the tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram. These tribal areas of the respective States have been specified in Parts I, II, IIA and III of the Table appended to Paragraph 20 of the Sixth Schedule to the Constitution of India. Tribal Areas are separately mentioned in Part I, II, IIA and III as hereunder:

PART I (Assam)

1. The North Cachar Hills District
2. The Karbi Anglong District
3. The Bodoland Territorial Areas District

PART II (Meghalaya)

1. Khasi Hills District
2. Jaintia Hills District
3. Garo Hills District

PART IIA (Tripura)

1. Tripura Tribal Areas District

PART III (Mizoram)

1. Chakma District
2. Mara District
3. Lai District

Each of the areas mentioned above constitute an Autonomous District and for the administration of each of these districts, a District Council shall be constituted.[5] However if any of the autonomous districts is inhabited by different Tribes then the Governor may divide it into autonomous regions and each region falls within the jurisdiction of a Regional Council constituted in the region by the Governor.[6] However, the provisions of sub-paragraph (2) of paragraph 1 empowering the Governor to divide the autonomous District into regions are not applicable to the Bodoland Territorial Areas District. The word 'autonomous' indicates right of self-governance[7]

The District Council is both administrative as well as a legislative body.[8]The District Councils constituted under paragraph 2 consists of elected members as well as nominated members. Each District Council shall not consist of more than 30 members and out of these 30 members, 4 are nominated by the Governor and the rest are elected through adult suffrage.[9] However, the Bodoland Territorial Council shall consist of not more than 46 members of which 40 are elected on adult suffrage and six are to be nominated by the Governor.[10] The term

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[5] Paragraphs 1(1) and 2(1)
[6] Paragraph 1(2) and 2(2)
[7]Edwingson v State of Assam, (1966) 1 SCC 895
[8]Basu, Durga Das, *Commentary on the Constitution of India*, Vol. 10, Lexis Nexis, 2012, p.11677
[9] Paragraph 2(1)
[10] Proviso to paragraph 2(1)

of office of the elected members is five years from the date of first sitting whereas the nominated members hold office during the pleasure of the Governor.

The District Councils and Regional Councils, if any, constituted under paragraph 2 of the Schedule have legislative powers as well with respect to the subjects mentioned in paragraph 3 of the Schedule. It is to be clarified that the laws enacted by the District Councils do not apply to the areas which are under the administrative control of a Regional Council inspite of the fact that the Regional Council falls within the autonomous district. Thus, though an autonomous region is formed from within the autonomous district, yet the laws framed by the District Council do not apply to the area administered by the Regional Council. The laws framed by the District Council or Regional Council, as the case may be, come into operation only after it has received the assent of the Governor and not before that.[11] These discretionary powers of the Governor are exercised by him only on the aid and advice of the Council of Ministers.[12] District Council is not however, part of Government Machinery. Hence person appointed by the District Council are not employee under the State.[13]

Apart from the legislative powers enshrined under paragraph 3 of the Schedule, the North Cachar Hills Autonomous Council, Karbi Anglong Autonomous Council and the Bodoland Territorial Council have been given additional powers of legislation.[14] These laws are also subject to the approval of the Governor and come into force only after receiving the assent of the Governor. Further, if any law made by these Councils relate to matters specified in List III of the Seventh Schedule to the Constitution of India, then the same is to be reserved by the Governor for consideration of the President.[15] Upon such consideration by the President, he may either give assent to the law or may direct the Governor to return the law to the Council concerned for reconsideration of the law. Such reconsideration shall be done by the District Council concerned within a period of six months which shall thereafter again be presented to the President through the Governor.[16]

For the administration of justice in the autonomous districts and autonomous regions, the District Councils and Regional Councils have been empowered to establish village courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes and reside within their jurisdiction.[17] This power is in exclusion to the courts and cases which fall under paragraph 5(1) of the Schedule. The appellate power over these Village Courts is exercisable by the Regional Council or District Council itself or the Courts constituted in that behalf by the Council.[18] The High Court being the constitutional court shall exercise power over the courts constituted under the

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[11] Paragraph 3
[12] *Pu MyllaiHlychho v. State of Mizoram,* AIR 2005 SC 1537: (2005) 2 SCC 92
[13] Abdul v Garo Hills District AIR 1961 Assam 69
[14] Paragraph 3A and 3B
[15] Paragraphs 3A(2) and 3B(2)
[16] Paragraphs 3A(3) and 3B(3)
[17] Paragraph 4(1)
[18] Paragraph 4(2)

Sixth Schedule of the Constitution in accordance with the order passed by the Governor.[19]

For proper functioning of the courts constituted under paragraph 4, the Regional Council and the District Councils have been empowered to frame rules with prior approval of the Governor with regard to the constitution of such courts, powers to be exercised by the courts and the procedure to be followed by the courts in trial of cases and all other matters connected with the administration of justice.[20]

Apart from the adjudication of disputes by the Village Courts, District Council and Regional Council under paragraph 4 of the Schedule, the Governor can confer power to try cases as per the provisions of Code of Civil Procedure or Code of Criminal Procedure and thereupon the Council, court or officer shall try suits, cases or offences in exercise of the powers so conferred. While trying such cases, the provisions of the Code of Civil Procedure or Code of Criminal Procedure shall not apply except as has been expressly provided.[21]

This is all about the legislative and judicial powers of the District Council and Regional Council. However, the Councils have also been bestowed with executive powers. The District Council also has power to establish, construct or manage primary schools, dispensaries, markets, cattle pounds, ferries, fisheries, roads, road transport and waterways in the district and may with the previous approval of the Governor make regulations concerning therewith. Apart from these, the Governor may also entrust some other works which otherwise are within the domain of the State Legislature.[22]

For each autonomous district and autonomous region, a District Fund and Regional Fund are constituted respectively to which all the funds of the respective Councils are credited.[23] The Councils are under an obligation to maintain proper accounts which are subject to be audited by the Comptroller and Auditor-General. The audit report prepared is submitted to the Governor which is then laid before the Council.

The District and Regional Councils also have the power to collect land revenue and impose taxes. For levying such charges, the Council concerned can frame rules and the same is to be submitted to the Governor for his assent and unless assented, the same shall have no force.[24]

The District and Regional Councils also generate revenue through the royalties for grant of lease of license with regard to minerals. Whenever the State Government grants license or lease for extraction of minerals from an area falling within the autonomous district or region, the District Council is also entitled to a

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[19] Paragraph 4(3)
[20] Paragraph 4(4)
[21] Paragraph 5
[22] Paragraph 6
[23] Paragraph 7
[24] Paragraph 8

share of royalty as is agreed upon between the State Government and the District Council. However, if any dispute arises with regard to the amount of royalty, the Governor shall make a decision in his discretion and the same shall be final.[25] This clause indicates that in all other matters pertaining to the Tribal Areas in the Schedule, the Governor acts on the advice of the Ministers.[26]

Further, if any person wants to carry on business within an autonomous district or region, the same shall be governed by the rules framed by the District Council and trade can be carried on only after grant of license by the District Council concerned.[27] As for as autonomy of District Council is concerned the law made by Parliament or the Legislature of State do not run automatically in these areas. These laws are either made by District Council or applied by them.[28] In the State of Assam, the laws framed by the State Legislature with regard to the subjects mentioned in paragraph 3 of the Schedule do not apply to the autonomous areas unless the District Council concerned adopts the same either with or without modification or exception. With regard to all other laws which are not related to paragraph 3 of the Sixth Schedule, and are passed either by the Parliament or the State Legislature, the Governor has been given the discretion to decide and notify as regards its applicability to the State of Assam.[29] In State of Meghalaya law made by District Council or Regional Council with regard to a matter under paragraphs 3(1), 8 or 10 of the Sixth Schedule shall be void to the extent of its repugnancy to any law made by the State Legislature. Further, with regard to any Act of Parliament, the President has the discretion to decide whether such law is applicable or not to the autonomous areas of the State of Meghalaya and the same is accordingly required to be notified. In such notification, the President may give direction for retrospective operation also.[30] In the States of Tripura and Mizoram, the laws framed by the State Legislature with regard to the subjects mentioned in paragraph 3 of the Schedule or with regard to consumption of non-distilled liquor do not apply to the autonomous areas unless the District Council concerned adopts the same either with or without modification or exception. All other laws not related to paragraph 3 of the Schedule or consumption of non-distilled liquor passed by the State Legislature shall be applicable or not will be notified by the Governor. Any Act of Parliament shall be applicable or not applicable to the autonomous areas under the Sixth Schedule will be based on the notification of the President. In such notification, the President may give direction for retrospective operation also.[31]

Apart from the above, the Governor may appoint a commission to examine and report on any matter relating to the administration of the autonomous districts or regions. The report of the commission, the Governor's recommendations thereon and an explanatory memorandum regarding the action

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[25] Paragraph 9
[26]Hidayatullah, J. in *Edwingson v. State of Assam,* AIR 1966 SC 1220
[27] Paragraph 10
[28]Basu, Durga Das, *Commentary on the Constitution of India*, Vol. 10, Lexis Nexis,2012, p.11678
[29] Paragraph 12
[30] Paragraph 12A
[31] Paragraph 12AA and 12B

proposed to be taken by the Government are placed before the State Legislature. A District or Regional Council may be dissolved by the Governor on the recommendation of the commission. In case the Governor wants to exercise its powers under paragraph 1(3) of the Schedule, then also a Commission needs to be appointed first for altering the area or name of the Autonomous Districts.[32] The Governor is also empowered to suspend or annul any Act or resolution passed by the District or Regional Council providedthat the Governor is satisfied that it is likely to endanger the safety of India. Once such order is passed by the Governor, it is to be laid before the State Legislature. Such order remains in force for a period of 12 months unless revoked by the State Legislature.[33] The Legislature can pass a resolution to extend the duration of the order further by 12 months at one time unless it has been revoked by the Governor.[34]

Though the Sixth Schedule is a part of the Constitution of India, yet any amendment made to the Sixth Schedule is not deemed to amount to an amendment of the Constitution under Article 368 of the Constitution. It is not only the Parliament which can amend the Sixth Schedule, but if the Governor exercises its power under clause (c), (d), (e) or (f) of sub-paragraph (3) of paragraph 1 of the Sixth Schedule of the Constitution, then also it leads to amendment of paragraph 20 of the Sixth Schedule and the Governor is empowered to do so.

From the above discussion, the following features of administration contained in the Sixth Schedule can be culled out. *Firstly,* the tribal areas in the four states of Assam, Meghalaya, Tripura and Mizoram have been constituted as autonomous districts. But, they do not fall outside the executive authority of the state concerned. *Secondly,* the Governor is empowered to organize and reorganize the autonomous districts. Thus, he can increase or decrease their areas or change their names or define their boundaries and so on. *Thirdly,* if there are different tribes in an autonomous district, the Governor can divide the district into several autonomous regions. *Fourthly,* each autonomous district has a district council consisting of 30 members, of whom four are nominated by the Governor and the remaining 26 are elected on the basis of adult franchise. The elected members hold office for a term of five years (unless the council is dissolved earlier) and nominated members hold office during the pleasure of the Governor. Each autonomous region also has a separate regional council. The strength of elected and nominated members in Bodoland Territorial Council is more and differ from other District Councils. *Fifthly,* the district and regional councils administer the areas under their jurisdiction. They can make laws on certain specified matters like land, forests, canal water, shifting cultivation, village administration, inheritance of property, marriage and divorce, social customs and so on. But all such laws require the assent of the Governor. *Sixthly,* the district and regional councils within their territorial jurisdictions can constitute village councils or courts for trial of suits and cases between the tribes. They hear appeals from them. The jurisdiction of high court over these suits and cases is specified by the Governor. *Seventhly,* the district council can establish, construct or manage

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[32] Paragraph 14
[33] Paragraph 15(2)
[34]Proviso to Paragraph 15(2)

primary schools, dispensaries, markets, ferries, fisheries, roads and so on in the district. It can also make regulations for the control of money lending and trading by non-tribals. But, such regulations require the assent of the governor. *Eighthly,* the district and regional councils are empowered to assess and collect land revenue and to impose certain specified taxes. *Ninthly,* the acts of Parliament or the State Legislature do not apply to autonomous districts and autonomous regions or apply with specified modifications and exceptions. And *lastly,* the Governor can appoint a commission to examine and report on any matter relating to the administration of the autonomous districts or regions. He may dissolve a district or regional council on the recommendation of the commission.

Conclusion:

The tribes in Assam, Meghalaya, Tripura and Mizoram have not assimilated much the life and ways of the other people in these states because of anthropological specimens. They have their roots in their own culture, customs and civilization. The Constitution, under Sixth Schedule, contains special provisions for the administration of tribal areas in these four North-Eastern states. These areas are, therefore, treated differently by the Constitution and sizeable amount of autonomy has been given to these people for self-government.[35] Upon careful analysis of the provisions of the Sixth Schedule to the Constitution of India, it appears that the Scheme of the Autonomous Councils is similar to that of the Constitution of India. The Governor exercises all such powers with respect to the District Council as it exercises with regard to the State Legislature. The Sixth Schedule is a Constitution within the Constitution of India as has been held by the Hon'ble Supreme Court.[36] The Sixth Schedule does not only provide for administration in simple terms, but the District Councils have been bestowed with legislative, executive as well as judicial powers.

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[35]Justice Ruma Pal and Samaraditya Pal, *"M.P. Jain, Indian Constitutional Law",* (2012) 6th edition, Lexis Nexis Butterworths Wadhwa, Nagpur, p. 516

[36]*Myllai Haichho vs. State of Mizoram,* AIR 2005 SC 1537

THE MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS AMENDMENT BILL 2019: AN OVERVIEW

Dr. Shilpa Seth*

Abstract: Aged parents have become a matter of burden for his family. Such a situation has resulted because of degenerating traditional values and break down of the joint family system. Stories of elderly people from well to do families, living on the streets after being ill-treated by their children have become common. The elderly should be seen as a blessing not a burden, Rather than putting them aside to be cared for separately they should be integrated into the lives of communities where they can make a substantial constitution to improving Social Conditions. This article brings out a perspective regarding awareness about the various aspects of the maintenance Act and law that can improve the lives of the elderly in India.

Keywords- Parents, Welfare, Maintenance.

Introduction:

Every citizen of India has fundamental right under Art.21 of Constitution of India to "live with dignity" i.e., right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social security and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The joint family system prevalent in the country ensured that the needs of the elderly are taken care of at a stage where they are unable to look after themselves because family has been the most vital non formal social security for its senior citizens, however nuclear families are taking their place and joint families are gradually withering away. The rational Indian value system considering elders as an intrinsic part of the family is no longer valued in correct perspective. In old age the main problem is financial insecurity. The financial situation of two third of population of senior citizens is not good. They live alone with insufficient resources. Their basic requirement is to live with dignity.

The parameters laid down in the Preamble and the concepts of welfare states are the guiding principles. For security and protection through the means of socio-political-economic justice, the state shall strive to reduce the inequalities in income, status and provide facilities and opportunities. In order to achieve these goals some statutory provisions are provided for the upliftment of aged persons or senior people in every sphere of their lives. The maintenance and welfare of parents and senior citizens Act 2007is most prominently one of them.

The Act is very brief with only 32 sections. Some of the salient features of the Act are[1]:

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1) It provides for summary proceedings within a period of 90 days from the date of filing a petition in s specially constituted Tribunal for this purpose.
2) The senior citizen may either apply in person or through a person authorized by him or through a voluntary organization registered under the Societies Registration Act.
3) The Tribunal on receipt of a petition will *suo moto* take it on file and refer it for conciliation by a conciliation officer within a period of one month.
4) The Tribunal enjoys the power of a first class magistrate and follows the same procedure of a civil court to adduce evidence from the petitioner and the respondent.
5) The Tribunal can pass an order granting a maximum sum of Rs. 10,000/- monthly as maintenance to the senior citizens.
6) The person against whom an order for maintenance has been passed has to comply with the order within one month, failing which the Tribunal can imprison him or her up to a period of one month.
7) The Act provides for the District Welfare Officer to act as maintenance officer and even to conduct the proceedings for and on behalf of the senior citizens.
8) The Act provides for the establishment of old age homes for the senior citizens by the concerned state governments.
9) Preferential treatment should be given to the senior citizens in the hospitals like separate queues, treatment, offering medicines and also promotion of research in the geriatric medicine.
10) Appearance of the lawyers before the tribunal is not permitted.
11) A senior citizen who has transferred his property either to his son or daughter or near relative, by virtue of a gift, can now get it cancelled by applying to the Tribunal, if he or she is neglected by the done.
12) During the pendency of the petition the tribunal is empowered to grand interim relief to the petitioner.

In *Paramjit Kumar Saroya v. Union of India and another*[1], [AIR 2014 P&H 121]. The Punjab and Haryana High Court examined the Act in detail and requested the central government to re-examine some provisions of the Act that were ambiguous. Thus Union Cabinet thus approved the Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019, which aims to provide for the maintenance and welfare of parents and senior citizens for ensuring their basic needs, safety and security, establishment, management, and regulation of institutions and services, and rights guaranteed under the Constitution. The Bill amends the maintenance of parents and Senior Citizens Act, 2007.

Key Features of the Bill[2]:

- **Definition of children has been expanded:** In the Act, the term 'children' refers to children and grandchildren, excluding minors. The Bill adds stepchildren, adoptive children, children-in laws, and the legal guardian of minors to the definition.

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[1]The Maintenance and Welfare of Parents and Senior Citizens Act, 2007.
[1]AIR 2014 P&H 121**.**
[2]Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019

- **Definition of relatives has been expanded:** The Act defines a relative as the heir of a childless senior citizen, excluding minors, who possess or would inherit his property after death. The Bill amends this to include minors represented by their legal guardians.
- **Definition of parents has been expanded:** The Act defines parents to include biological, adoptive, and step-parents. The Bill expands this definition to include both parents-in-law and grandparents.
- **Definitions of maintenance has been expanded**: Under the Act, maintenance includes the provision of food, residence, and medical attendance, this bill adds healthcare, safety, and security for parents and senior citizens to lead a life of dignity to it.
- Welfare includes the provision of food, healthcare, and other amenities necessary for senior citizens; this bill adds housing, clothing, safety, and other amenities necessary for the well-being of a senior citizen or parent to the list.
- **Maintenance fee:** Under the Act, state governments constitute maintenance Tribunals which may direct children and relatives to pay a monthly maintenance fee of up to Rs 10,000 to parents and senior citizens. The Bill removes the upper limit on the maintenance fee. The Tribunals may take the following into consideration while deciding the maintenance amount:
  1. The standard of living and earnings of the parent or senior citizen, and
  2. The earnings of the children.
- **Appeals:** The Act provides for senior citizens or parents to appeal the decisions of the maintenance Tribunal. The Bill allows children and relatives also to appeal decisions of the Tribunal.
- **Maintenance officer:** The Act provides for a maintenance officer to represent a parent during proceedings of the Tribunal. The Bill requires maintenance officers to ensure compliance with orders on maintenance payments, and act as a liaison for parents or senior citizens.
- **Establishment of care-homes:** Under the Act, state governments may set up old age homes. The Bill removes this and provides for senior citizen care homes which may be set up by the government or private organizations. These homes must be registered under the state government. The central government will prescribe minimum standards for these homes, such as food, infrastructure, and medical facilities.
- **Healthcare:** The Act provides for certain facilities (such as separate queues, beds, and facilities for geriatric patients) for senior citizens in government hospitals. The Bill requires all hospitals, including private organizations, to provide these facilities for senior citizens. Further, home care facilities will be provided for senior citizens with disabilities.
- **Appointment of Nodal Police Officers** for Senior Citizens in every Police Station and District level Special Police Unit for Senior Citizens has been included.
- **Offences and penalties**: The Bill increases the penalty for the abandonment of a senior citizen or parent from the imprisonment of up

to three months to imprisonment between three and six months, and fine of up to Rs 5,000, to Rs 10,000. The Bill also provides that failure to comply with the maintenance order by children or relatives may lead to imprisonment up to one month, or until the payment is made.

Analysis of the Bill:

- Under the Act, Maintenance Tribunals which is presided by administrative officers will decide the maintenance amount payable to senior citizens by children and relatives. The Bill states that the maintenance amount will be calculated based on (i) the standard of living and earnings of the parent or senior citizen, and (ii) the earnings of the children. Administrative officers may not have the judicial expertise required to determine the maintenance amount payable.
- Implementation of the Bill may be affected if states do not have adequate funds.
- Definition of "relative" is ambiguous. The Bill defines "relative" as any legal heir of a childless senior citizen. However, the senior citizen may change his will from time to time. Therefore, there is no finality on who would be the legal heir, and therefore who must maintain the senior citizen[1].
- Definition of homecare services not specified the Bill sets requirements for institutions providing homecare services to senior citizens who have difficulties performing activities of daily life due to physical or mental impairments. These requirements include: (i) hiring trained and certified attendants or caregivers, and (ii) registering with a registration authority set up by the state government. The Bill does not define what would homecare services include.
- There are no provisions related to the criteria of Appointment to the Jury in the tribunal.
- The appellate authority of the maintenance tribunal has not been provided in the bill.

Conclusion:

- The Ambiguity of the bill must be resolved through the amendment.
- There should be a mechanism to audit the old-age home at the regular interval.
- The definition of Grandchildren should be clear. Most of the Indian society follows the patriarchy where the maternal grand-parents are least connected with.

Though there are several numbers of laws and govt. policies made for the protection of rights of senior citizens and old parents but nothing much have been achieved so far. As we all know that our Indian society is blended with culture and emotion it is really very difficult for parents to drag their children to the doors of court or tribunal and in most of cases they start forgiving as well as sacrificing their rights. Because of this, the next generation does not have to face the proper lesson.

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[1]https://www.prsindia.org/billtrack/maintenance-and-welfare-parents-and-senior-citizens-amendment-bill-2019. Retrieved on 08.02.2021.

CLIMATE EMERGENCY: THE BIGGEST CHALLENGE OF THE HUMANITY

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Abstract: Climate change is a term which got recognition in the early 19th century. It has effects not only on any particular region or country rather the whole world is under its effects. Though various attempts have been made at the national, regional and global levels but the world community could not reach at the concrete and effective solution to save the humanity. This paper attempts to unearth the various aspects of climate change.
Keywords: Climate change, disaster, catastrophe.

Climate change is a crisis that must be rapidly addressed if catastrophe is to be averted. A new study shows that increases in extreme winter weather in the parts of the U.S. are linked to accelerated warming of the Arctic. Over the past four decades satellite records have shown how increasing global temperatures have had a profound effect on the Arctic[1]. Warming in the region is for more pronounced than in the rest of the World. And has caused a rapid shrinkage of Summer Sea ice. There has been a long –standing apparent contradiction between the warmer temperature globally, however, an apparent increase in cold extremes for the U.S. and in northern Eurasia. In the past, these cold extremes over the U.S. and Russia have been used to justify not reducing carbon, but there's no longer any excuse to not start reducing emissions right away[2]. Who is responsible for global warming?, Why has IPCC ,a UN body, sounded a red alert?, and finally What lies ahead?

Human activity is changing the climate in unprecedented and sometimes irreversible ways. It is unequivocal that human influence has warmed the atmosphere, oceans and land[3]. It is unequivocal and undisputed that humans are warming the planet[4]. This warming is already affecting many weather and climate extremes in every region across the globe, Whether it's heat waves like the ones recently experienced in Greece and Western North America, or floods like those I Germany and China. The consequences will continue to get worse for every bit of warming[5].

Cooperation on global warming could not be disentangled from border diplomacy. A warmer world is estimated to have a big impact on extremes of temperature and rainfall with implications for human health, ecosystem survival and sustainable economic activity[6]. It is virtually certain that hot extremes

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[1] Matt Mcgrath, B.B.C.News September 3, 2021

[2] *Supra note* 1

[3] IPCC report 09 August 2021

[4] Ed Hawkins,University of Reading U K cited by Matt Mcgrath. Climate change : IPCC report is code red for humanity, BBC News August 09, 2021

[5] *Supra note* 4

[6] G. Ananthakrishnan, Where will climate change strike?, *The Hindu* August 15, 2021 page 9

including heat waves have become more frequent and more intense across most land region as witnessed since the 1950s, while cold extremes including cold waves have become less frequent and less severe. Scientific confidence is now high that human induced climate change is the main driver of these changes[7].

There are other impacts too. Climate change has contributed to increases in agricultural and ecological droughts in some regions due to increased land evapotranspiration. Enhanced warming is expected to amplify thawing of permafrost and loss of seasonal snow cover of land, ice and Arctic sea ice. Under scenario of rising CO2 emissions, two of the big carbon sinks on the planet- the oceans and land- may become less effective at slowing the accumulation of CO2 in the atmosphere[8].

India's major concern are centred around the health of the annual monsoon, the fate of Himalayan glaciers, heating over land, floods, droughts and overall impact on people's well-being, agriculture and food production[9]. Heatwaves, and humid heat stress will be more intense and frequent during the 21st century and both annual and summer monsoon rainfall will rise, with higher degree of variability between years. Such a situation creates a lot of uncertainty which in turn counteracted increases in monsoon rainfall produced by warming[10].

Global warming is affecting people's health so much that emergency action on climate change cannot be put on hold. Health is already being harmed by global temperature increases and the destruction of natural world. There was mounting evidence that we are nearing or have already crossed a number of climate tipping points[11]. In the past 20 years, heat related mortality among people older than 65 years has increased by more than 50 percent. Higher temperature have brought increased dehydration and renal function loss, dermatological malignancies, tropical infections, adverse mental health outcomes, pregnancy complications, allergies, and cardiovascular and pulmonary morbidity and mortality[12]. These effects, which hit those most vulnerable like minorities, children and poorer communities hardest, are just the beginning[13].

Some Countries do a bit more than others but that none were coming close to what was needed. Some politician is less worse than others but tackling climate change was not as easy as voting for a green party. It's a hopeful sign that people want something that's more green-whatever green means-but in order to solve this we need to tackle this at a more systemic approach[14]. COP 26 conference will

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[7] *Supra note* 6
[8] *Supra note* 3
[9] *Supra note* 6
[10] See also Vinod Shanker Tripathi, Global Crisis of Climate Justice, Biochemicals and cellulae Archives Vol 16, Suppliment 1, Jan, 2016 pages 85-88
[11] Editors of 220 medical, nursing and Public health journals from around the world called for urgent action on climate change in a joint editorial published on September 06, 2021 11:40:22 IST
[12] *Supra note* 11
[13] *Supra note* 11
[14] Greta Thunberg. BBC Scotland by Kevin Keane August 31. 2021

not lead to anything if we do not treat this crisis like a crisis. It should be all about climate justice and we cannot achieve climate justice if everyone is not contributing on the same terms[15]. Continued warming would influence the global water cycle, further intensifying it, with consequences for its variability, global monsoon precipitation and the severity of wet and dry events[16].

Better air quality alone would realise health benefits that easily offset the global costs of emissions reductions. The risk posed by climate change could dwarf those of any single disease. Despite world's necessary preoccupations with Covid-19, we cannot wait for the pandemic to pass to rapidly reduce emissions. The Covid-19 pandemic will end, but there are no vaccine for the Climate crisis[17]. Every action taken to limit emissions and warming brings us closer to a healthier and safer future. Many governments met the threat of Covid-19 with unprecedented funding and a similar emergency response to the climate crisis needed without any defence. Government must make fundamental changes to how our societies and economies are organized and how we live.

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[15] *Supra note* 6

[16] *Supra note* 3

[17] Tendros Adhanom Ghebreyesus, Chief of World Health Organization in a Press Statement on September 06,2021

HUMAN RIGHT CONCERN TO CLINICAL TRIALS IN INDIA

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Nemi Chand Saini**

***Abstract*:** A Clinical trial is also known as medical research, clinical studies or research protocols, basically is a type of research study. The most commonly performed clinical trials evaluate new drugs and medicines, vaccines, medical devices, biologics, or other interventions on patients in strictly scientifically controlled finding, and are required for regulatory authority approval of new therapies. Protecting human and human' life dignity and preventing abuse of them are core concepts in both bioethics and human rights. Every clinical trial requires careful analysis of whether it is ethically acceptable for patients to participate. Ethical considerations should be of continuing concern throughout the design and conduct of the trial. In fact, the principles that guide biomedical research ethics were developed in response to specific incidents of exploitation, in present scenario the rapid globalization of biomedical research in recent decades introduces new challenges in preventing exploitation. This is the reason of delay of making Covid-19 vaccination campaign in the world. Developed countries and multinational corporations now commonly conduct clinical trials in many groups of people.
Keywords: Clinical Research, Ethical issues, Human volunteers, Good clinical practice, Vaccines.

Introduction:

Clinical research is described as a well systematic investigation in human beings designed to discover or contribute to a body of generalizable knowledge. As clinical research involves human volunteers and participants, scientists, researchers, and their teams are legally and ethically obligated to protect them under the strictly control of health care laws. In clinical practice a physician would be expected to use interventions that have a reasonable expectation of success and are designed solely to enhance the wellbeing of an individual patient. As against this, clinical research is designed to test a hypothesis, permit conclusions to be drawn, and thereby develop or contribute to generalizable knowledge. In clinical trials the participant therefore may not get the best-known treatment and therefore, the obligations on the researcher are more.[1]Traditional medical practice entails a doctor prescribing for a patient that treatment which in his judgment, based on past experience of himself and others, offers the best prognosis. Since there are few conditions for which treatment is a hundred presents effective, there

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[1] Urmila Thatte. "Ethical issues in clinical research." *Indian Journal of Plastic Surgery*, vol. 40, no. 1, 2007. accessed 15 Feb. 2020.

is much scope for potential improvements in the therapy. Such improvements are derived via a clinical trial.

Most human subjects beings inside the growing countries suffer from poor fitness and reduced the life expectancy. The function of clinical trials studies that contribute to the development of suitable treatments and ailment prevention measures is critical. However, lack of resources and poor infrastructure mean that many researchers in developing nations have very restricted capability to behaviour their very own medical studies. They therefore, often adopt studies in partnership with agencies from advanced international locations. A sound moral framework is a critical protect to avoid feasible exploitation of research members in those instances.[2]

Clinical Trial:

Any planned test/research which entails sufferers and is designed to reveal the maximum suitable remedy of future patients with a given clinical condition. It makes use of outcomes based totally on a confined pattern of sufferers to make inferences approximately how treatment should be conducted in the well-known populace of sufferers who would require treatment in the future. The majority of scientific/clinical trials are involved with the evaluation of drug therapy, but they also can be involved with different kinds of remedy, e.g., Vaccines trials, Surgical tactics, Radiotherapy, etc., or high-quality of lifestyles, etc.

Clinical trials fall into four stages:
Phase I - to decide an appropriate drugs/vaccines dosage
Phase II - to offer evidence of efficacy of treatment
Phase III - to evaluate efficacy/facet results with those of every other drugs/remedies/placebo
Phase IV - huge scale epidemiological take a look at (in particular industry)

Ethical Issues:

Every clinical trial requires cautious evaluation of whether it is ethically ideal for patients to take part. Ethical concerns need to be of continuing concern throughout the design and conduct of the trial. For the behaviour of clinical trials in the United States, United Kingdom and in India there is a totally thorough procedure of both country wide level and nearby Ethical Committee approval, designed to ensure protection of the patient. All medical trials want to have their protocol approved by means of such a committee before the trial commences. The ethical committee approval places extensive emphasis on knowledgeable patient, or determine, consent. The protection and well-being of the patient are paramount and should continually take precedence over technology and studies.[3]

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[2] Michael Igoumenidis, Sophia Zyga, "Healthcare research in developing countries: ethical issues", Health Science Journal, Volume 13, Issue 6, accessed 15 Feb. 2020.

[3] Stuart J. Pocock, "Clinical Trials: A Practical Approach", Medical chapter 7, Ethical Issues, 2013, John Wiley & Sons Publishers, Page 100-101

Conduct of Clinical Trials/Research:

Recommendations guiding clinical doctors in biomedical studies related to human volunteers are contained within the Declaration of Helsinki, adopted through the World Medical Assembly in Helsinki in 1964, and updated in the end and time to time so far. Originally added in connection with pharmaceutical enterprise trials the concepts of Good Clinical Practice have now been followed to a greater or lesser degree via all conducting medical trials.

Good Clinical Practice:

It is a fixed of rules and guidelines this is supplied with the aid of International Conference on Harmonization (ICH) - a worldwide body that regulates clinical trials involving human subjects. Good scientific exercise suggestions include protection of human rights as a topic in clinical trial. It additionally provides assurance of the protection and efficacy of the newly developed compounds. Good Clinical Practice Guidelines consists of rules on how scientific trials have to be conducted; outline the roles and obligations of scientific trial sponsors, scientific research investigators, and clinical research assistants.

Ethical Conduct:

Clinical trials are intently supervised by way of appropriate regulatory authorities. All studies that involve a clinical or therapeutic intervention on sufferers ought to be approved by using a supervising ethics committee earlier than permission is granted to run the trial. The nearby ethics committee has discretion on how it will supervise non-interventional research such as observational research or those the usage of already accumulated records. In the U.S., this frame is called the Institutional Review Board (IRB). Most IRBs are placed on the nearby investigator's health facility or organization, but some sponsors permit the use of a relevant *i.e.,* Independent/for income, IRB for investigators who involved at smaller institutions. To be ethical, researchers have to gain the whole and informed consent of participating human subjects. (One of the IRB's primary functions is making sure that capacity patients are properly informed about the scientific trial.) If the affected person is unable to consent for him/herself, researchers can be trying to find consent from the affected person's legally approved consultant. Ethics is the utility of values and ethical regulations to human activities and bioethics is part of applied ethics that uses moral standards and choice-making to clear up actual or predicted dilemmas in medicine and biology. There can only a few arguments against the want for moral review of protocols for human studies earlier than starting the research.

A predominant difficulty in managing trial consequences comes from industrial, political and/or academic stress. Most trials are costly to run, and could be the end result of large preceding studies, that's itself not cheap.[4]

Existing Research Ethics Guidelines:

Phase I drug studies and Phase I and II vaccine studies should be conducted only in developed communities of the country of the sponsor. In general, phase III vaccine trials and phase II and III drug trials should be conducted simultaneously in the host community and the sponsoring country; they may ignore within the sponsoring country on circumstance most effective that the drug or vaccine is designed to deal with or save you an ailment or other circumstance that hardly ever or never takes place within the sponsoring united states. It isn't always difficult to look the enchantment of trying to adhere to this type of precept. By following this precept, one would no longer most effectively avoid the plain instances of abuse, but by way of requiring that the sponsoring country. Definitely carries out the studies at domestic, one would make sure that there are no reasons which may not be at once obvious to outsiders for no longer wanting to carry out the studies in one's home country. The precept has obtained significant assist from a few growing countries and from some of commentators. The Indian Council of Medical Research lately refused to fund research via foreign agencies if they are only accomplished in India.[5]

The Indian Council for Medical Research (ICMR) Ethical Guidelines for Biomedical Research on Human subjects (available at http://icmr.nic.in/ethical.pdf) turned into published in 2000 and presently, its miles predicted that all establishments in India which perform any shape of biomedical studies related to humans have to observe these tips in letter and spirit to defend the safety and well-being of all studies members. Thus, the two foremost protections offered to an individual taking part in any medical research are written informed consent and ethics committee evaluate. Often a query is asked - which sort of studies desires ethics assessment. Clearly all and any studies in humans must be preceded by using permission from an ethics committee. The sort of studies can be potential or retrospective, may be an invasive, experimental observe concerning a brand-new drug or new tool or maybe a vintage drug or device or an "easy" questionnaire-primarily based have a look at, in regular subjects or in sufferers, a look at searching at histopathology specimen or serum samples, a business enterprise-sponsored project or a Government-sponsored one, an academic mission or a student's thesis. As long because it includes research on people, the investigator must reap ethics committee permission. If we

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[4] International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), E6 (R1) Good Clinical Practice: Consolidated Guideline, Available at: http://www.ich.org/, accessed on 22.10.2020

[5] Reidar K. Lie, "Ethical issues in clinical trial collaborations with developing countries - with special reference to preventive HIV vaccine trials with secondary endpoints", Bulletin of the World Health Organization 86, 2016; 650-651

need research to be the world over applicable, papers should conform to these country wide and worldwide pointers.[6]

General Ethical Issues:

All the research involving human participants should be conducted in accordance with the four basic ethical principles namely autonomy (respect for person/participant), beneficence, non-maleficence (do no harm) and justice. The guidelines laid down are directed at utility of those simple concepts to research related to human individuals. The Principal Investigator is the man or woman liable for now not simplest assignment research but additionally for observance of the rights, health and welfare of the individuals recruited for the investigations. She/he should have qualification and competence in biomedical research methodology for proper conduct of the study and should be aware of and comply with the scientific, legal and ethical requirements of the study protocol.

Compensation for Accidental Injury:

Research participants or Human volunteers who suffer physical injury as a result of their participation are entitled to financial or other assistance to compensate them equitably for any temporary or permanent impairment or disability. In case of undesired happening, their dependents are entitled to material compensation. The sponsor whether a government, a pharmaceutical company, a university, a firm or an institution, should agree, before the research begins, in the a priori agreement to provide compensation for any physical or psychological injury for which participants are entitled or agree to provide insurance coverage for an unforeseen mishappening or injury whenever possible.[7]

Human Rights Violations in Clinical Trials in India:

In 2009, the States of Andhra Pradesh and Gujarat launched a studies assignment for the vaccination in opposition to the human papilloma virus (HPV) that can cause cervical most cancers. Adolescent ladies among a while of 10 – 14 within the States of Andhra Pradesh and Gujarat had been to be vaccinated. The vaccines had been provided with the aid of GlaxoSmithKline and Merck. The task was designed and performed by means of PATH (Program for Appropriate Technology in Health) and funding turned into received from the Bill & Melinda Gates Foundation. In April 2010, however, the Government of India suspended the program as numerous violations of ethical requirements by way of PATH were

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[6] Urmila, Thatte "Ethical issues in clinical research" Indian Journal of Plastic Surgery [serial online] 2007 [cited 2016 Dec 18]; 40:2. Available from: http://www.ijps.org/text.asp?2007/40/1/2/32653, accessed on 22.10.2019

[7] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3601709/ accessed on 01.02.2020

broadly pronounced through human rights organizations. However, by means of that point, 24,000 ladies were already vaccinated.[8]

In 2011, a parliamentary enquiry committee found that the process of knowledgeable consent changed into insufficient (particularly thinking the reality that college head masters signed consent forms on behalf of the youngsters, calling it "wrongful authorization"). Informed consent is the process wherein trial volunteers are knowledgeable about the nature, importance, implications and dangers of the trial. Informed consent is vital to defend human beings in opposition to undesirable experimentation. Also, within the absence of personal bodily injury, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) acknowledges that a lack of informed consent constitutes a human rights violation: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In precise, no person shall be subjected without his loose consent to clinical or medical experimentation." The parliamentary committee similarly criticized that the tracking machine did no longer file all damaging events. Monitoring of clinical trials is, but, important to perceive accidents and reply right away and adequately.[9]

Judicial Decision on The Liability of The Trial Sponsors:

Women's health activists determined to take the case to court and in January 2013 they filed a public hobby petition (PIL) at the Indian Supreme Court. Since then, the Court has advised the Indian government to advance the regulatory framework on clinical trials and improve its gadget of approval of licenses. Not yet fully addressed, however, is the role of the non-state actors in the protection of trial participants. What are the duties of those beginning, financing and carrying out scientific trials? What are the duties of the manufacturers whose drug or vaccine is tested? Scholars have highlighted the complexity of the criminal relationships amongst parties in medical trials. This petition at the HPV vaccination project offers the opportunity to the Supreme Court of India to address the responsibilities and legal responsibility of those non state actors.[10]

Given the lack of judicial precedent, European Centre for Constitutional and Human Rights (ECCHR) determined to post a testimony to the Indian Supreme Court. ECCHR's document outlines the obligations of trial sponsors and manufacturers based on a evaluate of relevant standards that are advanced in global treaties and declarations; in addition to relevant legislation and jurisprudence, particularly from Europe (in particular the United Kingdom) and America, wherein the non-state respondents have their headquarters. This

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8 https://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Summary__Clinical_Trials__2014-02-11.pdf

9 72nd Report, Department of Health Research, Ministry of Health and Family Welfare, Para. 7.13

10 https://igmpiindia.org/fcr-case-studies.html

comparative evaluation can inform the usual of care that can be anticipated from "affordable businesses." The loss of knowledgeable consent and the shortage of tracking represent violations of the proper to be free from merciless, inhuman or degrading treatment and the right to fitness. It has been identified that states might also breach their worldwide human rights law responsibilities wherein such abuse may be attributed to them, or where they fail to take appropriate steps to prevent, look into, punish and redress private actors' abuse. The Indian Supreme Court's ruling within the HPV case may want to order such investigation, offer get entry to a powerful treatment, and consequently increase the protection of trial topics. There is remarkably little case law at the obligations of those task scientific trials. The Court's ruling concerning the HPV vaccination venture can accordingly serve to increase the jurisprudence in this regard to clarify and put in force the exceptional obligations of sponsors, manufacturers, and clinical studies agencies in scientific trials. As there is even less case regulation at the obligations in trials performed in 1/3 international locations, the Court's ruling can additionally serve to clarify and implement transnational responsibilities.[11]

In *Maneka Gandhi v. Union of India*[12], the Supreme Court stated: "Right to life enshrined in Article 21 means something more than animal instinct and includes the right to live with human dignity, it would include all these aspects which would make life meaningful, complete living."

In *Shantistar Builders v. Narayan Khimalal Totame*[13]**,** the Supreme Court stated: "The right to life is guaranteed in any civilized society.

The legal basis of the human volunteers has been helpfully spelt by the Nation Human Right Commission (NHRC) in the proceeding of hearing from time to time. Article 21 of the Constitution of India guarantees a fundamental right to life and personal liberty. The expression 'life' in this article has been judiciary interpreted to mean a life with human dignity and not more survival or animal existence.

Declaration of Helsinki:

The 55th General Assembly of the WMA took place in Helsinki on September 2003; a long-waited meeting which it was hoped would have allowed the controversies that arose from the latest version of the Declaration of Helsinki to settle. A final agreement in the town where the Declaration had been established for the first time in 1964 would give a symbolical value to the event. The opponents of paragraph 29 considered that studies controlled by placebo were essential for a reliable statistical assessment of the results of the trial. This is moreover the reason why the FDA recommends systematic control, because the methodology of the scientific study is otherwise worthless, and if worthless, the research projects

[11] https://www.scribd.com/document/282046456/Case-Summary-Clinical-Trials-2014-02-11

[12] AIR 1978 SC 597

[13] (1990) 1 SSC 520

do not receive subsidies. By following paragraph 29, institutions, including universities, have taken the risk of a negative response from their Institutional Review Board, from the NIH and obviously from the FDA. Therefore, several scientific projects involving human subjects have been interrupted and others not even started. In the circumstances the protests are understandable.

The opponents of paragraph 30 emphasised the very poor functioning of the healthcare systems in poorly resourced nations where most experimentation involving human beings is carried out. This paragraph would oblige the pharmaceutical companies to provide the participants with the best-proven treatment identified at the end of the study. From the drug industry's point of view this cannot be afforded.[14]

A working group would examine whether paragraph 29 was really an obstacle to reliable scientific research and also consider the financial implications of paragraph 30. It was felt advisable to involve in the discussions external representatives respected for their moral authority and expertise. Thus, the CIOMS took part in the debates despite engaging in rewriting its own "ethical guidelines for biomedical research".

The working group decided to add a note of clarification to paragraph 29 rather than rewrite it. The note of clarification was adopted by the 160th the Council of the WMA, October 7th, 2001, and is now an integral part of the Declaration of Helsinki.[15]

The Declaration of Helsinki[16] which forms the basis of clinical research today was first accepted by the 18th World Medical Assembly in 1964 and has been revised five times since and the latest version was published in 2000 at the 52nd WMA, Edinburgh, Scotland. It consists of 32 concepts and has made informed consent a central requirement for ethical research and truly mandates that "all protocols have to be submitted to an ethics committee for overview, which should be unbiased of the investigator, the sponsor or any other sort of undue impact".

The World Medical Association, and in particular its Medical Ethics Committee, Council, General Assembly and Secretariat, will undoubtedly be influenced by this statement in the further refinement of the Declaration, a

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[14] "Declaration of Helsinki" as last revised in 64th WMA General Assembly, Fortaleza, Brazil, October 2013; Notes of clarification on Paragraph 29 and Paragraph 30 added 2002 and 2004: World Medical Association (WMA), https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/, accessed on 22.12.2020

[15] "The world medical association's declaration of Helsinki: historical and contemporary perspectives", World Medical Journal, Official Journal of the World Medical Association, INC G20438 Nr. 5, Vol 59, October 2013 https://www.wma.net/wp-content/uploads/2016/11/wmj201305.pdf, accessed on 22.10.2020

[16] Available at https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/

process directed in the final analysis by the need to safeguard and promote human health in developed and developing countries alike, and in particular to protect patients and others in the medical research enterprise.[17]

Vaccines for Covid-19 virus:

The world's 5 most famous vaccines are as follows -

1. Oxford University-Pharma company AstraZeneca's & Serum Institute of India vaccine (AZD1222)
2. American Pharma company Moderna's vaccine (mRNA-1273)
3. Vaccine of US firm Pfizer and German biotech company BioNTech (BNT162b2)
4. Chinese firm Sinovac's vaccine (Coronavac)
5. Russian Government vaccine (Gam-Covid-Vac Lyo)

In India there are three Covid-19 vaccine under development -

1. "Covaxin" of Bharat Biotech & ICMR
2. "Covishield" of Oxford University-AstraZeneca, UK & Serum Institute of India
3. "ZyCoV-D" of Zydus Cadila

The Drug Controller General of India (DCGI), the country's national drug regulator, announced on 3rd January 2021 that the Central Drugs Standard Control Organisation (CDSCO) has determined to just accept the pointers of its Subject Expert Committee (SEC), and authorized the Covid-19 vaccines of each Serum Institute of India and Bharat Biotech for restricted and emergency use in the country.

Conclusion:

This Research study has focused that the general prohibition against carrying out phase III trials in developing countries but not in developed countries is not defensible. Trials which most, if not all, would find ethically unobjectionable have in the past been carried out in developing countries in this way, and there are circumstances, such as legitimate disagreement among experts, or legitimate differences in the evaluation of social risks, that would lead to legitimate differences of opinion concerning the acceptability of trials. There are also legitimate reasons for carrying out phase I and phase II trials in developing countries, but not in developed countries. I have also argued, however, that one should be aware of the controversial nature of arguments that accept a higher individual risk in developing countries for the sake of some future social benefit. I have also argued that, under certain conditions, one may justify trials in developing countries that cannot be carried out in developed countries because of economic differences between the nations.

This Research study has had a somewhat narrow focus, discussing the various arguments for and against trials in light of current guidelines. I do believe,

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[17] Reidar K. Lie, "Ethical issues in clinical trial collaborations with developing countries - with special reference to preventive HIV vaccine trials with secondary endpoints", Bulletin of the World Health Organization 86, 2016; 650-651

however, that one substantial conclusion can be drawn from the arguments presented in this paper, and that is that there is a need to revise the guidelines. The phrasings of the guidelines we accept today seem to prohibit trials in developing countries that reasonable people would find acceptable. Not only would reasonable people find these trials acceptable, but there are in fact strong reasons for encouraging more research and more research collaborations with developing countries.

There is a need to build infrastructure for research, to develop expertise, and to carry out research that is addresses the types of problems found in India. One could make the case that some of the currently accepted guidelines hinder, rather than facilitate, that development. This makes it even more urgent to review the procedures we accept today, and make appropriate revisions in the guidelines.

All agreed that the ethical review of research played a crucial role in protecting research participants. The fact that the process in the host and sponsor countries was beset by a number of problems, ranging from logistical delays to more substantive differences of opinion that could not be resolved by consultation with the guidance, was a major concern.

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BEYOND TRANSCENDENTAL INSTITUTIONAL JUSTICE

Dr Prayas Dansana[1]

***Abstract*:** Justice has many forms and classifications. Professor Amartya Sen in his works visualise justice in two broad categories - 'transcendental institutional justice' and 'focus realization-based justice'. In the ultimate understanding of 'justice', it is connected with the way people's lives go, and not merely with maturity of the institutions, surrounding the people or procedures laid down for running of socio-political-legal administrative institutions. Justice cannot be divorced from the actual world that emerges. Mechanically pursuing 'transcendental institutionalism' by adhering to the norms of institutional rules may not always end in the position of being fair. The present article is an endeavour to argue in favour of 'focus realisation-based justice'. To buttress the said juristic arguments, the author has used the decision of the Hon'ble Orissa High Court in the case of Dr. B.K. Mahakul v. Sambalpur University (2008 (II) OLR 246) and the related facts of the case.

***Keywords*:** Justice, Transcendental Institutional Justice, Focus Realisation-based justice, Law and Justice.

Introduction:

This article is on demand of 'Justice' for going beyond 'transcendental institutional justice' and moving towards 'focus realization based justice' as advocated by Prof Amartya Sen in his book 'The Idea of Justice'[2]. A realization-focused perspective of justice makes it easy to see the importance of the prevention of manifested injustice in the world, rather than focus on the search for perfect institution. This is so, as ultimately 'justice' is connected with the way people's lives go, and not merely with maturity of the institutions, surrounding the people or procedures laid down for running of socio-political-legal administrative institutions. Justice cannot be divorced from the actual world that emerges[3]. Of course, institutions and rules thereof do play a very pivotal role in influencing what happens, and they do form part and parcel of the actual world, but the realized actuality goes well beyond the organizational picture. Generally, the quest for setting up a just society leads us to formulate the basic postulates of justice for determining the basic social institutions that we envisage. Prof John Rawls, one of the leading modern philosophers persuaded us to link pursuit of justice with the idea of fairness[4]. Though there are divergent opinions, yet the foundational notion is to avoid bias in our evaluation or treatment. However, mechanically pursuing 'transcendental institutionalism', which advocated us to adhere to the norms of institutional rules, may not always end in the position of being fair. In fact, one may, sometimes, end up in the wrong side of justice. To buttress the aforesaid argument, the author is using the decision of the Hon'ble Orissa High Court in the case of Dr B K Mahakul v. Sambalpur University[5] and subsequent action

[1]Asst. Professor, P.G. Department of Law, Sambalpur University, Sambalpur.

[2] Sen A (2009), *The Idea of Justice.* New Delhi: Penguine Books Pvt. Ltd.

[3] Amartya Sen – Hiren Mukharjee memorial lectures delivered on 11/08/2008 at Parliament of India

[4] Rawls,J.(1999). *A Theory of Justice.* Massachusetts : Harvard University Press

[5] (2008 (II) OLR 246)

ensued thereof. The author is using this particular case and the collateral facts of the case as an instrument to put forth his juristic argument.

***Dr B K Mahakul v. Sambalpur University*: Facts and Collorary Ensuing Events:**

Sambalpur University, a State University of Odisha, called for application for various teaching posts in 2004. On scrutiny of applications received, eligible candidates were called for interview as per the norms laid down in the Act and Statute under which it is governed and subsequently, appointments were also made. After two years of such appointment, i.e. on 2006. University authorities annulled the selection of Dr B K Mahakul on the ground that the selection was not in conformity with the Orissa Universities First Statute, 1990 (herein after referred as Statute) and consequently terminated the service of him. Dr Mahakul challenged action of the University on its legality. One of the grounds of contention was that the University had violated the principles of natural justice as the petitioner was not given due opportunity of hearing before terminating his service. University took the plea that since there was no fault on the part of the petitioner, no opportunity was given. The Hon'ble Orissa High Court, too, found that there was no illegality in terminating the service of the petitioner**.** Consequently, the termination letter was given effect in 2008. Against the decision of the Hon'ble Orissa High Court decision, subsequently, the petitioner filed a SLP in the Hon'ble Supreme Court (hereinafter referred to as SC) and the same was dismissed[6] with the order that the leave petition was without any merit.

Few Pertinent Issues on Delivering Justice:

The HC as well as SC had upheld the stand taken by the University that there were certain conspicuous mistakes on the part of University at the time of awarding marks during selection process. The Statute permits the University authority to rectify their mistake by annulling their previous decision and the authority did that. The Hon'ble High Court dismissed the petition by observing that there was no illegality on the part of University. But, the moot question here is, whether the justice was being administered in this case? All the actors, in this case, had performed their part without any *mala fide* and illegality; but, what about the person whose service was terminated for no fault of his? Is it only a case of wrong man at wrong time? Law by itself is not an end; it is only a means to an end, i.e., 'Justice'. Can we assert that law has delivered justice in this particular case? There are few pertinent issues involved in the stated case which need some deliberation on the context of 'focus realization-based justice'.

A. How just it is to terminate the service of a person only on the ground of illegality at the time of appointment, wherein the affected person has not contributed, in any form, for the said illegality? How just it would be to let a person suffer for no fault of his? Can such action be termed as fair or just action? A society cannot be termed a just society, wherein a big fish can freely at will devour a small fish. Being small cannot *per se* be a reason for prosecution. The subject of justice is not merely to endeavor to establish some perfectly just society or arrangement. Rather it is an effort to minimize or prevent the manifested injustice. Here, the author likes to cite two cases

[6] SLP No.13015 of 2008, https://main.sci.gov.in/jonew/bosir/orderpdf/650685.pdf (last accessed on 01/10/2021)

wherein the Hon'ble Supreme Court has taken the stance of "*Nyaya" (focus realization based justice)* rather of *"Niti" (Organizational propriety).* In the case of Rajendra Prasad Mathur v. Karnataka University[7], the appellants were not eligible for admission to the Engineering Degree Course of the Karnataka University and their admission was contrary to the Ordinance prescribing the condition of eligibility. The court observed that the fault lies with the Engineering Colleges which had admitted the appellants in spite of their ineligibility. The SC further observed and passed the judgment that 'there is no reason why the appellants should suffer for the sins of the managements of these Engineering Colleges' and allowed to petitioners to continue their studies in the respective Engineering Colleges in which they were granted admission. Similarly, in the case of Ashok Chand Singhvi v. University of Jodhpur[8], the SC posed this question- "when all facts were before the University and nothing was suppressed by the appellant, would it be proper to penalise the appellant for no fault of his?" By applying the principle of Rajendra Prasad Mathur case, it was pronounced that since "the appellant was not at fault and we do not see why he should suffer for the mistake committed by others". Strictly speaking as a positivist, since in both the aforesaid instances the appellants did not fulfil the minimum conditions for admission into their respective colleges[9], their admissions into the colleges were grossly illegal. Nonetheless the Hon'ble SC has gone beyond the 'transcendental institutionalism' and delivered their order in favour of appellant. In the aforesaid two cases SC, while delivering their judgment, had conceptualized justice on a realization-focused understanding. It had not happened in the case of Dr B K Mahakul, though the action of the University as well as the Court decision had directly and adversely affected his quality of life and the life of the persons dependent on him. It must be considered that had Dr Mahakul been given a chance of hearing, he would have appealed to the authority with the fact that he had been serving as a lecturer for more than 15 years in a private college before his selection and joining the University. Needless to mention that after termination of his service at the University, he was a man without a job. The University authority as well as the court had acted as per the laid down settled law, but inadvertently their action had put him without any means of livelihood for no fault of his. Furthermore, acceptance of this *ratio decidendi*, that the service of a person can be terminated for the illegality in his appointment though it was not contributed by him, ill create unwarranted social and economic insecurity in the mind of all employees. In case, this judgment is used as precedent[10], all government employees will be under constant fear of termination of their service, since they themselves are not certain about whether there is any illegality in their appointment or not. Let's say there is some glaring illegality on certain appointments which are not contributed by appointee, how fair it would be to take away someone's livelihood for no fault of him. Law, as an instrument of justice, cannot be a cause for social or economic insecurity, real or unreal.

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[7] Rajendra Prasad Mathur v. Karnataka University and another, AIR 1986 SC 1448

[8] Ashok Chand Singhve v. Jodhpur University &another, AIR 1989 SC 823

[9] In Mathur case, the appellant did not have the minimum educational qualification and in Rajendra Prasand Singhvi case, the appellant applied the admission after the stipulated last date.

[10] The author has reservation to treat the obiter dicta of said case as a precedent since it is marred by *per incuriam* and *sub silentio*.

B. When the "right to be heard" is available under natural justice, (esp. in the matter related to civil adverse consequence)? The author believes that the answer to the aforesaid question is directly linked with the process of focus based realization of justice. In other words, it facilitates the process of reducing injustice in the course of administration. In the case of Dr B K Mahakul v. Sambalpur University, the petitioner contended for violation of Natural Justice as he was not given due opportunity of hearing. On this, defendant, i.e. the University Authority, had made this averment that as University had not taken any action against the petitioner on the ground of negligence / misconduct, no show cause notice was given to the petitioner[11]. There are a few pertinent questions which need to be ruminated. Is it mandatory for application of 'audi alteram partem' that other party must be at fault? To what extent observation of settled principles of natural justice can be compromised when non-observance would have made no difference to the said admitted or indisputable facts of the case. In the case of S L Kapoor v. Jagmohan[12], Chinappa Reddy J. pondering on the aforesaid question has observed that 'the principles of natural justice know no exclusionary rule'. This observation indicates that application of natural justice principles is independent of the fact whether it would have made any difference if natural justice had been observed or not. It is observed in the same case that the Court might not issue its writ to compel the observance of natural justice, not because it approved the non observance of natural justice but because Courts did not issue futile writs. Justice Chinnappa Reddy rejecting non-observation of natural justice principles on aforesaid argument termed such stance as 'pernicious' to natural justice. Under the accepted doctrine of 'legitimate expectation' where a person has no legal right to a hearing and the administrative authority has no duty to offer it, the person to be affected may, yet, possess a 'legitimate expectation' that he would be given an opportunity of being heard or to make his representation before any decision is made affecting his interests[13]. Here it would not out of place to reiterate another proposition of justice that 'justice should not be done but seen to be done'. SC in another case[14] observed that 'there should be hearing according to natural justice whenever an employee of a statutory corporation is going to be subjected to any adverse or penal consequences. In the given context, the author likes to emphasis on the words 'adverse consequences'. Natural justice is implied in the law even if the concerned persons have no effective answer to give. This proposition was reiterated by SC in Olga Tellis v. Bombay Municipalities Corporation[15]. Further, in the O P Gupta v. Union of India[16], Justice A P Sen observed that 'the normal rule of justice demands that before making a decision, concerned authority should give a hearing to the concerned affected parties. It is an implied principle of 'Rule of Law' that any order having civil consequence should be passed only after following the principles of natural justice.' It was further asserted by the SC that 'it is an elementary principle of natural justice that parties affected by

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[11] Though the Hon'ble HC is silent on the issue of application of natural justice principles in this case, one needs to deliberate on it. (2008(II)OLR 246)
[12] AIR 1981 SC 136
[13] Swadeshi Cotton Mills v. Union of India AIR 1981 SC 818; Kapoor v. Jagmohan AIR 1981 SC 136; Subba Rao v. AP AIR 1975 SC 94
[14] K L Tripathy v. SBI AIR 1984 SC 274
[15] AIR 1986 SC 178
[16] AIR 1987 SC 2258

any order should have right of being heard[17]. In the case of O P Gupta v. UI[18], SC observed that 'It is a fundamental rule of law that no decision must be taken which will affect the rights of any person without first giving him an opportunity of putting forward his case'. The facts of Dr B K Mahakul Case suggest that there is no arbitrary or mala fide action on the part of authority, yet the author observes there are visible lapses on procedural front to nip the unintended injustices. It would not be out of place to note that procedural fairness is an implied mandatory requirement to protect arbitrary action[19]and fair play. The notion of procedural fairness is aimed at limiting the human arbitrariness in order to curb unjust practices and to facilitate the principle of 'equality' for reducing injustices, if any.

Conclusion:

It is generally assumed that judges are in charge of interpreting and articulating law – the law made by the representatives of people and by the politically accountable branches of government. Judges are there only to apply law in its 'as it is form'. These assumptions lead us to a conclusion that judiciary should only confine itself to correct illegality, that is the action which occurs outside the structured domain of 'law'. This proposition is only acceptable when we envisaged an ordered society. But when we solemnly commit ourselves to secure a society wherein justice is one of the paramount conditions for all aspects of human life, aforesaid assumptions of an ordered society and role of judiciary may not stand good for all circumstances for establishing a 'just society'. Injustice comes in many forms, most of which do not arise within the domain of law. But some injustices are legal injustices. Yes, there are legal injustices - 'when injustices are expressed in legal form' or from legal platform. These injustices must be corrected and can only be corrected by legal means that is, the means recognized within the prescribed legal structure, which involve political, electoral, legislative, administrative and judicial processes. When an alleged injustice involves constitutional organization, institutional obligations, fundamental rights, and certain other normative constraints on government / public power, contemporary constitutionalism has traditionally allocated the responsibility of correcting this sort of injustice to the 'Judiciary'. The role of judiciary becomes more onerous, since they are the last line of defence or last crusader so to say for restoration of justice. All the process of public life is regulated by the rule of law, enforced by judges in accordance with constitutional ethos. It is generally assumed that judges are in charge of interpreting and articulating law – the law made by representatives of people and by the politically accountable branches of government and judiciary is necessarily subordinate to the democratic process of government. These assumptions lead us to a conclusion that judiciary should only restrain to correct injustices which may occur outside the structured domain of 'law'. These assumptions drive us further to believe that judges are there only to apply law in its' "as it is form". This proposition is only acceptable when we envisaged an ordered society. But when we solemnly commit ourselves to secure a political society wherein justice is one of the paramount conditions for all aspects of human life, all the aforesaid assumptions of an ordered society may not stand in good stead for

[17] Raghunath Thakur v. State of Bihar (1989) 1 SCC 229
[18] AIR 1987 SC 2258
[19] Rashaal Yadav v. State (1994)5 SCC 267,277

all circumstances for a 'just society'. In this backdrop, few pertinent questions arise – Whether 'Rule of Law' only ordains to enforce the law and law only or it is also there to correct injustice, including the legal injustice? Isn't it the demand of the justice to go beyond the 'Transcendental Institutionalism' and to focus on all redressible injustices? Institutions while involve in administration of justice, they need to concentrate on realization based justice. Law and enforcement of law is not all about mathematical austere reasoning; the inherent limitation of law to appreciate human complex and dynamic life do not allow application of law in its strict form.

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BLOCKING OF WEBSITES IN INDIA: LAWS AND PRACTICES

Dr. P.K. Pandey*
Shreya Pandey**

Section 69A of the Information Technology Act, 2000 is a narrowly drawn provision with several safeguards.

-Supreme Court of India[1]

***Abstract*:** The innovative character of human beings has helped a lot in achieving many things required for their easy and comfortable life. The human beings, through their hard labour and energized work, have invented such a platform where the whole world looks like a village in which things are accessible within few minutes which are the result of our ongoing hard work. But, at the same time it has to keep in mind that these achievements have to be utilized cautiously otherwise the consequences may be disastrous. In other achievements, the access of information technology is very vital for development of not only this generation rather it has efficiency to do many things for future generations also. It is the result of information technology that today we are able to have connections from items located at other planets also. For proper regulation of information technology equipped society, the Indian Parliament has enacted Information Technology Act. Under the provisions of this Act, the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 has been made by the Central Government.

***Keywords*:** Information Technology, Website, Law.

Introduction:

The information technology, on one hand, has provided many things which have made our life comfortable through providing quick, efficient and prompt access to the whole world but on other hand it may, if intentionally used for misfeasance, result in varied nature of devastating loss not only to single person rather to humanity also. It is well accepted fact that the development and rapid increase in the use of information technology including computer, mobile phone and internet has given rise to new forms of offences and thus the effective regulatory mechanisms to control and root-out such ill-intended activities are need of hour. With the help of information technology, the information may be posted from any place of the world and any person having internet connection through mobile phones or computers may access and accordingly act or react. It is well known fact that people, on the basis of religion, are coming into touch with terroristic groups through various websites and they are being brain-washed and trained to fight against humanity. Not only this, as mentioned in the Statement of Objects and Reasons of Bill which introduced the Information Technology (Amendment) Act, 2008, 'publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of

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[1] *Shreya Singhal v. Union of India*, Writ Petition (Criminal) No.167 of 2012 decided on March 24, 2015.

data by intermediary, e-commerce frauds like personation commonly known as Phishing, identity theft and offensive messages through communication services' without disclosing identity have become very easy. In such circumstances, the issue of blocking websites is more relevant and significant. The present paper unearths the legal provisions relating to blocking of websites in India with some recommendations relevant in this regard.

Understanding Blocking of Websites:

The internet websites may be of different types, nature, and ideas but one thing is common i.e. publication of information. Information may be for any particular group, for whole world or for any specific purpose which are accessible through internet connection and thus it is one mode of expression of our thoughts, ideas and opinions which are guaranteed under various international and regional instruments[2] as a fundamental human right for every person around the world. Like this, the Constitution of India also recognizes the Freedom of Speech and Expression under Article 19 (1) (a) which empowers to every Indian citizen to exercise this fundamental right without unreasonable and arbitrary restrictions. As the internet holds enormous potential for development of society, the freedom of speech and expression is not available to traditional media only rather it is available for internet and all types of emerging media platforms also. On June 29, 2012, the Human Rights Council unanimously adopted the landmark *Resolution on the Promotion, Protection and Enjoyment of Human Rights on the Internet*[3] in which it has been affirmed that-

> "The same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with Articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights."

Article 19 (2) of the Constitution of India mentions the restrictions about freedom available under Article 19 (1) (a), it means that freedom of speech and expression is not absolute right and restrictions may be imposed on the grounds mentioned under Article 19 (2). Article 19 (2) mentions that 'nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State,

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[2] Article 19 of the *Universal Declaration of Human Rights;* Article 19 of the *International Covenant on Civil and Political Rights*; Article 15(3) of the *International Covenant on Economic, Social and Cultural Rights*; Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; Article 12 and Article 13 of the *Convention on the Rights of the Child*; Article 13 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*; Article 13 of the *American Convention on Human Rights*; Article 10 of the *European Convention on Human Rights*; Article 9 of the *African Charter on Human and Peoples Rights*; Article 32 of the *Arab Charter of Human Rights.*

[3] A/HRC/20/L.13 United Nations General Assembly

friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence'. Thus, it is clear that the access of internet websites may be restricted on the following grounds-

* in the interest of sovereignty and integrity of India
* security of the State
* friendly relations with foreign States
* public order
* decency or morality
* in relation to contempt of court, defamation or incitement to an offence

Thus, undoubtedly the internet websites have a lot of things for all round development of humanity but at the same time the State, being the custodian and protector of its citizens, has right to block access of websites which contain unwanted, harmful and controversial contents.

Procedure of Blocking of Websites: Blocking of websites in India may be classified in two parts: Before 2009 and after 2009.

Before 2009- Before 2009, the power to issue the instructions in the context of blocking of websites in India was vested with Computer Emergency Response Team-India (CERT-IND) under the notification.[4] In case of a complaint regarding website, the CERT-IND had to verify the authenticity of the complaint and satisfying that action of blocking of website is absolutely essential, had to instruct Department of Telecommunications, Government of India to block the website. The CERT-IND could be approached by the-

(a) Secretary, National Security Council Secretariat (NSCS).
(b) Secretary, Ministry of Home Affairs, Government of India.
(c) Foreign Secretary in the Department of External Affairs or a representative not below the rank of Joint Secretary.
(d) Secretaries, Departments of Home Affairs of each of the States and of the Union Territories.
(e) Central Bureau of Investigation (CBI), Intelligence Bureau (IB), Director General of Police of all the States and such other enforcement agencies.
(f) Secretaries of Heads of all the Information Technology Departments of all the States and Union Territories not below the rank of Joint Secretary of Central Government.
(g) Chairman of the National Human Rights Commission or Minorities Commission or Scheduled Castes or Scheduled Tribes Commission or National Women Commission.
(h) The directives of the Courts.
(i) Any others as may be specified by the Government.

The Department of Telecommunications was under duty to ensure the blocking of websites and inform CERT-IND accordingly. But, latter in this

[4] New Delhi, the 27th February, 2003, G.S.R.181(E)

respect separate legislative norms were felt very much necessary and in 2008 the Information Technology Act, 2000 was amended.

After 2009- In the Information Technology Act, 2000 the major amendments were made in the year 2008[5] and one of them is insertion of section 69A which empowers the Central Government of India to block the access of any website by public. This section provides as under-

> *69-A. Power to Issue Directions for Blocking for Public Access of Any Information through Any Computer Resource.*-(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.
>
> (2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.
>
> (3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine.

Gujarat High Court in *Gaurav Sureshbhai Vyas v. State of Gujarat and others*[6], said that "the aforesaid Section shows that the situations envisaged are, "in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above". Further, a direction can be issued under Section 69A for blockage of public access to such information and it may also be relating to "any information generated, transmitted, received, stored or posted in any computer resource".

Thus, it is clear from section 69A that the Central Government of India may direct in writing to block access of any internet websites which are violating the constitutional and statutory boundaries. Under the provisions of section 69A (2), the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 have been framed.

Constitutional Validity of Section 69A and Rules, 2009-

The constitutional validity of section 69A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public)

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[5] The Information Technology (Amendment) Act, 2008

[6] Writ Petition (Pil) No. 191 of 2015 decided on 15/09/2015.

Rules, 2009 was assailed before Hon'ble Supreme Court of India[7] on the following grounds-

* There is no pre-decisional hearing afforded by the Rules particularly to the "originator" of information.
* Procedural safeguards such as which are provided under Section 95 and 96 of the Code of Criminal Procedure are not available here.
* The confidentiality provision affects the fundamental rights of the petitioners.

But, the Court did not accept the plea raised as mentioned above and held that the first and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution. Further, the Court held that the Rules provide for a hearing before the Committee set up - which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under sub-section (3) of Section 69A. Furthermore, the Court said that merely because certain additional safeguards such as those found in Section 95 and 96 CrPC are not available does not make the Rules constitutionally infirm. Thus, the court was of the view that the Rules are not constitutionally infirm in any manner.

Responsibilities under Rules- The Rules, 2009 have prescribed the responsibilities of the following institutions in respect of blocking of websites as under-

Central Government-The Central Government of India has been expected to appoint a Designated Officer by notification in Official Gazette to an officer of the Central Government not below the rank of a Joint Secretary for the purpose of issuing direction for blocking the access by the public any information generated, transmitted, received, stored or hosted in any computer resource.[8] It is worthwhile to mention that the Rules have provided to deal with the matter through appointing a Central Government Officer not below the rank of Joint Secretary which shows the seriousness of the matter. Section 2 (1) (k) of the Act, 2000 defines the term "computer resource" as 'computer, computer system, computer network, data, computer data base or software'. The Designated Officer does not entertain any complaint or request for blocking directly from

[7] *Shreya Singhal v. Union of India*, Writ Petition (Criminal) No.167 of 2012 decided on March 24, 2015.
[8] Rule 3

any person rather it accepts request or complaint from the Nodal Officer of an Organization or from a competent court. He is under obligation to maintain complete record of the request received and action taken thereof, in electronic database and also in register of the cases of blocking for public access of the information generated, transmitted, received, stored or hosted in a computer resource.[9]

Organisations-The Rules define the term "organisation"[10] to include the following-

* Ministries or Departments of the Government of India
* State Governments and Union territories
* Any agency of the Central Government, as may be notified in the Official Gazette, by the Central Government.

These organisations have been mandated to designate one of its officers as the Nodal Officer and accordingly the same has to be intimated to the Central Government in the Department of Information Technology under the Ministry of Communications and Information Technology, Government of India in addition to the publication of the name of the said Nodal Officer on their website.[11]

Intermediaries- An "intermediary", with respect to any particular electronic message, means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.[12] The Rules mandate to every intermediary to designate at least one person to receive and handle the directions for blocking of access by the public any information generated, transmitted, received, stored or hosted in any computer resource. The Designated Person of the Intermediary shall acknowledge receipt of the directions to the Designated Officer within two hours on receipt of the direction through acknowledgement letter or fax or e-mail signed with electronic signature.

Process of Websites Blocking- The whole process of blocking of websites may be divided in the following parts-

On Application of Any Person- Where any person finds any objectionable or unwanted content in any website, he may send complaint to the “Nodal Officer” of the concerned Organization for blocking the concerned website. After receiving the complaint, the organisation has to examine the received complaint to satisfy themselves about the need for taking of action in the light of the parameters laid down in Section 69A(1) of the Act, 2000 and after being satisfied, it has to transmit the request in writing on the letter head of the respective organisation either by mail or by fax or by e-mail through its Nodal Officer to the Designated Officer in the specified format. The Designated Officer has to acknowledge the receipt of such request within a period of twenty four hours of its receipt and

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[9] Rule 15
[10] Rule 2 (g)
[11] Rule 4
[12] Section 2 (1) (w) of the Information Technology Act, 2000.

such request has to be assigned a number alongwith the date and time of its receipt.[13]

The request made by Nodal Officer and received by the Designated Officer alongwith the printed sample content of the alleged offending information or part thereof has to be examined by a Committee consisting of the Designated Officer as its Chairperson and representatives, not below the rank of Joint Secretary in Ministries of Law and Justice, Home Affairs, Information and Broadcasting and the Indian Computer Emergency Response Team.[14] At the first hand, the Committee's whole exercise will be to identify the person/intermediary who has hosted the information or part thereof as well as the computer resource. If the concerned person/intermediary is identified, the Committee has to issue notice to appear and submit their reply and clarifications at a specified date and time, which shall not be less than forty-eight hours from the time of receipt of such notice by such person/intermediary. In case of non-appearance of such person/intermediary, who has been served with the notice, the Committee shall give specific recommendation in writing with respect to the request received from the Nodal Officer, based on the information available with the Committee. But, where such a person/intermediary is a foreign entity or body corporate as identified by the Designated Officer, notice shall be sent by way of letters or fax or e-mail signed with electronic signatures to such foreign entity or body corporate and any such foreign entity or body corporate shall respond to such a notice within the time specified therein, failing which the Committee shall give specific recommendation in writing with respect to the request received from the Nodal Officer, based on the information available with the Committee.[15]

If the Committee finds that the request is covered under section 69A (1) and it is justifiable to block requested website, the Designated Officer shall submit the recommendation of the Committee to the Secretary in the Department of Information Technology under the Ministry of Communications and Information Technology, Government of India for his approval. If the recommendation is approved by the Secretary, Department of Information Technology, he will direct the concerned agency of the Government or the intermediary to block the offending information generated, transmitted, received, stored or hosted in their computer resource for public access within the time limit specified in the direction but if the recommendation is not approved by the Secretary, the Designated Officer shall convey the same to such Nodal Officer.

In Emergency Cases- When the Designated Officer receives any request which is of emergency nature where delay is not acceptable, he has to examine the request and printed sample information and consider whether the request is within the scope of section 69A (1) and it is necessary or expedient and justifiable to block such information or part thereof and submit the request with specific recommendations in writing to Secretary, Department of Information Technology. Thereafter, the Secretary, Department of Information Technology

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[13] Rule 6
[14] Rule 7
[15] Rule 8

may, if he is satisfied that it is necessary or expedient and justifiable for blocking for public access of any information or part thereof through any computer resource and after recording reasons in writing, as an interim measure issue such directions as he may consider necessary to such identified or identifiable persons or intermediary in control of such computer resource hosting such information or part thereof without giving him an opportunity of hearing. The Designated Officer, at the earliest but not later than forty-eight hours of issue of direction, shall bring the request before the Committee for its consideration and recommendation. On receipt of recommendations of Committee, Secretary, Department of Information Technology, shall pass the final order as regard to approval of such request and in case the request for blocking is not approved by the Secretary, Department of Information Technology in his final order, the interim direction issued shall be revoked and the person or intermediary shall be accordingly directed to unblock the information for public access.[16]

The Rules mandate to decide the request received from the Nodal Officer expeditiously and in any case it should not be more than seven working days from the date of receipt of the request.[17]

On Court's Order- When the Designated Officer receives the certified copy of the order of a competent court to block of any information or part thereof of website, he shall immediately submit it to the Secretary, Department of Information Technology and initiate action as directed by the court.[18]

Non-Compliance by Intermediary- If the intermediary does not comply with the direction of the Central Government, the punishment may be awarded with imprisonment for a term which may extend to seven years with fine.[19] In this respect it is necessary to mention here that in case of failure on the part of intermediary to comply with the direction issued to him, the Designated Officer shall, with the prior approval of the Secretary, Department of Information Technology, initiate appropriate action as may be required to comply with the provisions of section 69A (3) of the Act.[20]

The Rules provide that strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.[21]

Delhi High Court in *UTV Software Communication Ltd. v. 1337X.TO*[22], expressed its views that since website blocking is a cumbersome exercise and majority of the viewers / subscribers who access, view and download infringing content are youngsters who do not have knowledge that the said content is infringing and / or pirated, it directed the MEITY/DOT to explore the possibility

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[16] Rule 9
[17] Rule 11
[18] Rule 10
[19] Sec. 69A(3) of the Act, 2000
[20] Rule 12
[21] Rule 16
[22] CS(COMM) 768/2018 decided on 10 April, 2019

of framing a policy under which a warning is issued to the viewers of the infringing content, if technologically feasible in the form of e-mails, or pop-ups or such other modes cautioning the viewers to cease viewing/downloading the infringing material. In the event the warning is not heeded to and the viewers / subscribers continue to view, access or download the infringing/pirated content, then a fine could be levied on the viewers/subscribers.

Conclusion:

The contribution of information technology is significant for each and every individual in present scenario through removing the geographical boundaries etc. The people are exercising their freedom of speech and expression in varied ways with the help of computer, mobile phones and internet. In line with the Rules and laws, the Department of Telecommunications, Ministry of Communication & IT, Government of India issued a letter, blocking 857 internet websites, under the provision of section 79 (3) (b) of the Information Technology Act, 2000 as the content hosted in these websites relate to morality, decency as given in Article 19 (2) of the Constitution of India.[23] But the material fact is that if these websites are blocked again many websites are being launched without any control. To deal with such issues, the international cooperation is required in which the separate laws of distinct sovereign countries are a great barrier. More than this, only notifying by Government of India cannot solve the problem rather continuous monitoring is required and if any intermediary/internet service provider is found guilty of violating these norms, there should be huge amount of fine in addition to imprisonment having deterrent effects. What can be expected from private sector internet service providers whose single motto is to get benefit, the condition of Government owned BSNL is also fully dissatisfactory. Despite the ban imposed by Government of India as mentioned above, the BSNL has allowed to access many banned websites.

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[23] No. 813-7/25/2011-DS (Vol.-V) dtd. 31.07.2015

NEED OF EXECUTIVE COMPENSATION AND EMPLOYEE BENEFIT ARRANGEMENTS IN EMPLOYMENT AGREEMENT

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***Abstract*:** In socialist country like India, social security of employees working in various skilled, unskilled, regulated and unregulated sectors becomes indispensable. On the contrast, attractive perks and bonuses to talented workers is also the need of the day in order to plug in the brain drain. In this article we shall analyze every important employee benefits and compensation in both government and private sector. We shall also study their legal aspects, their nature (whether mandatory or optional) and statutes governing them. This shall give us an opportunity to compare these benefits and introspect their impact on lives of the employees.
***Keywords*:** Executive Compensation, Employee benefit, Social Security, Workman.

Introduction:

In India, the terms of employment differ among two class of employees i.e. 'workmen' and 'non-workmen'. Workman is defined under section 2(s) of the Industrial Disputes Act[1] as "any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward…" However sub clause (iii) and (iv) to section 2(s) provides that personnel who have managerial, administrative or supervisory functions and who earn compensation above specified thresholds respectively are not included in the category "workman". Although not defined statutorily anywhere, with help of judicial precedents we can refer to such class of employees as "Executive Employee". They are persons whose duties relate to active participation in control, supervision and management of business, or who administer affairs, or who direct, manage, execute or dispense.[2]

Employee Benefit are the non-financial benefits that are offered to the employees apart from their salaries. These benefits are broadly divided into two categories: mandatory and discretionary. Both the category are governed by various statutes which prescribes the rules for the same. These employee benefits which are mandatory includes gratuity, paid leaves, maternity leaves, statutory bonuses etc. while discretionary ones include contractual bonus, Employee Stock Option Plans (ESOP) etc.

Employment is a subject under the concurrent list of the Indian Constitution and thus under ordinary circumstances both the state as well as the union

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[1] The Industrial Disputes Act, 1947, § 2.

[2] Steiner v. Pleasantville Constructors, 181 Misc. 798, 46 N.Y.S.2d 120, 123.

government has authority to makes laws on it.[3] In terms of executive compensations, which are not mandatory under the statute and are rather discretionary, the employers are given flexibility in structuring these; however, they must take into consideration the thresholds stipulated by specific legislations, such as:

1. The Minimum Wages Act, 1948 (the lower threshold of wages);
2. The Companies Act, 2013 (Higher threshold of the remunerations payable to the senior level employees.)
3. In case of Publicly Traded Companies disclosure under rule number 23(9), 30, 31A and 32(7A) etc. of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations).

In this paper we shall now read about some common employee benefits and employee compensations; statutory provisions thereof; how they are drafted into employment contracts and what their purpose is.

Mandatory Benefits:

Statutory Bonus:

At the end of World War 1, certain textile mills in India granted 10% of wages as war bonus to their workers in 1917. The Government taking cue from this established a commission to make recommendation on the profit based bonus scheme for the employees. The Government of India accepted the recommendations of this Commission and "The Payment of Bonus Act" was introduced in the Parliament in the year 1965. It was amended twice: once in 2015 and once in 2019.

A. Objective:
The chief objective of this Act was to impose a legal responsibility upon the employer of every establishment covered under the Payment of Bonus Act to pay at least a minimum bonus to employees[4] earning up to a fixed amount of salary, give a formula to calculate that bonus[5] and put a cap on the minimum and maximum sum to be paid as such bonus.

B. Applicability:
The Payment of Bonus Act 1965, is only applicable when all of the following conditions are met:
- The company has at least 20 employees[6]
- The employee's wages are not more than 21,000 every month.[7]
  Earlier this Act only covered employees that were earning up to ₹ 10,000 per month. However, the amendment has raised this ceiling to ₹ 21,000. The employers will have to pay employees that fall between the ₹ 10,000 and ₹ 21,000 the pending Bonus amounts since 1st April 2014.

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[3] The Constitution of India, 1950, Schedule VII, List III, Item 24 (Welfare of labor including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits).
[4] The Payment of Bonus Act 1965, § 10
[5] The Payment of Bonus Act 1965, §§ 4, 7
[6] The Payment of Bonus Act 1965, § 3 (b)
[7] The Payment of Bonus (Amendment) Act, 2015, Bill No. 6 of 2016, § 2, 1st January 2016

C. Eligibility :
Every employee shall be entitled to receive bonus, in accordance with the provisions of the act, if he has worked for not less than 30 working days in that year.[8] An employee[9] under the Act means any person:
   a. Who is not an apprentice, and
   b. Who is engaged for hire/reward and
   c. The terms of his employment are either express or implied and
   d. Is doing any skilled or unskilled manual or supervisory or managerial or administrative or clerical or technical work.
   e. Is not drawing salary/wages exceeding ₹ 21,000 per month

D. Calculation and Payment of Bonus :
Minimum:
Every employee not drawing salary/wages beyond ₹ 21,000 per month who has worked for not less than 30 days in an accounting year, shall be eligible for bonus for a minimum of 8.33% of the salary/wages,[10] even if there is loss in the establishment[11]. If an employee is earning in a range of ₹7,000 to ₹21,000, then for the purpose of Payment of Bonus Act the salary shall be deemed to be ₹ 7,000 per month.[12]
Maximum:
Where the allocable surplus exceeds the amount of minimum bonus payable to the employees under Section 10 of the Act, the employer shall be bound to pay bonus in that accounting year in proportion to salary during that accounting year subject to maximum of 20% of the earned wages in that year.[13]
Section 2(4) of The Payment of the Bonus Act defines "allocable surplus" as
(a) 67% of the available surplus in an accounting; year; in case being a company which:
- is not a banking company and
- in relation to its employees, has not made the arrangements under Section 194 of the Income-tax Act for the declaration and payment of the dividends payable out of its profits.

(b) In any other case, 60% of such available surplus.

This bonus must be paid within eight month of the closure of accounting year.[14]

Provident Fund:

A. Objective:
Provident Fund is a Publicly Managed Old-Age Income Security Program. It is basically a social security scheme. It works on a model fixed under the. Under the Employees' Provident Fund and Miscellaneous Provisions

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[8] The Payment of Bonus Act 1965, § 8
[9] The Payment of Bonus Act 1965, § 2 (17)
[10] The Payment of Bonus Act 1965, § 10
[11] J & K State Road Transport Corporation v. Tarlochan Singh and Others, 2019 LLR 622 (J&K HC)
[12] The Payment of Bonus Act 1965, § 12
[13] The Payment of Bonus Act 1965, § 11
[14] The Payment of Bonus Act 1965, § 19(b)

Act, 1952 ("EPF Act"), all organizations with more than 20 employees are required to register with the EPFO. When an individual starts working in an establishment with more than 20 employees, both the individual, i.e. the employee, and the employer are required to contribute a certain percentage of the basic pay to the EPF account.

B. EPF Model and Working Scheme:
Let's understand how this model works. For example say an employee earns ₹ 10000 per month. Under the EPF act, 12% of this amount, i.e. ₹ 1200 gets deducted at end of each month. Now this money is put into a pool, i.e. the EPF account. The employer of this employee also has to contribute same percentage, i.e. 12% of this salary at the end of this month. Now where this contribution does goes? 3.67% of the employer's contribution goes to the EPF account and the rest 8.33% goes to the pension scheme[15]. Thus the EPF account now has (12% + 3.67%) of the basic pay, i.e. a total of ₹ 1367 getting pooled every month.
There is a separate provisions for the organizations where there are 20 or less than 20 employees /organizations with losses incurred more than or equal to the net worth (at the end of financial year) /organizations declared sick by the Board for Industrial and Financial Reconstruction. They only have to contribute 10% to the EPF.

C. Management of Fund and Calculation Of Interest Thereupon:
The Government pool together all incoming provident fund and entrusts them to a trust. This trust, also established by the government, invests these funds into various securities and generates average annual interest in the range of 8% to 13%. As per the figures on the official EPF website, the interest rate applicable on the PF is 8.75%, which is paid annually. The compound interest is paid on the opening balance (the amount accumulated till the date of computing) every year on 1st April.

D. Exception from Income Tax:
Under the Indian Income Tax Act[16], the interested earned on the EPF investment, and the amount an employee eventually withdraw from the EPF account is exempted from income tax. Also, the employer contribution to the EPF is tax-free.

E. Withdrawal of the Provident Fund:
These are the processes of withdrawing a provident fund:
1. Retirement or after attaining the age of 55 years.
2. If unemployed for two months after resigning or losing a job, 75% may be withdrawn post 1 month of unemployment.
3. If the member is permanently settling abroad.
4. 90% of the Fund may be withdrawn if the Subscriber has attained the age of 54 and the rest a year later.

Employee Insurance:

A. Objective
Employees' State Insurance Scheme of India is an integrated social security scheme tailored to provide social protection to workers and their

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[15] The Employee Pension Scheme 1995 (EPS).
[16] The Income Tax Act, 1961, § 80C

dependents, in the organized sector, in contingencies, such as, sickness, maternity and death or disablement due to an employment injury or occupational hazard.

B. Applicability-The ESI Act, (1948) applies to following categories of factories and establishments:
   1. Non Seasonal, using power and employing 10 or more workers.
   2. Non Seasonal, not using power and employing 20 or more workers.
   3. Seasonal, not using power and employing 20 or more workers.

   Although the ESI Act is enacted by Centre but by virtue of the seventh schedule of the Indian Constitution most of the State Governments have extended the ESI Act to certain specific class of establishments: shops, hotels, restaurants, cinemas, preview theatres, motors transport undertakings and newspaper establishments etc., which are employing 20 or more persons.

C. Financing of the Insurance Scheme:
   The ESI Scheme is mainly financed by contributions raised from employees covered under the scheme and their employers, as a fixed percentage of wages. Employees of covered units and establishments drawing wages up to ₹10, 000/- per month come under the purview of the scheme for social security benefits. However, employees' earning up to ₹50/- a day as wages are exempted from payment of their part of contribution. The State Governments bear one-eighth share of expenditure on Medical Benefit within the per capita ceiling of ₹900/- per annum and all additional expenditure beyond the ceiling.

D. Benefits Under ESI:
   Employees covered under the scheme are entitled to:
   1. Medical facilities in ESIC hospitals for self and dependents.
   2. Cash benefits in the event of specified contingencies resulting in loss of wages or earning capacity such as disability.
   3. Maternity benefits for insured women.
   4. If an insured person passes away due to employment injury, his dependents are eligible for family pension.

Maternity Leave:

Maternity leave is a statutory leave. It is predominantly covered under the Maternity Benefit Act, 1961 which was enacted to regulate the employment of women in certain establishment for certain period before and after child-birth and to provide for maternity benefit and certain other benefits.[17] A few other laws also cover the maternity leave and provisions thereof.

A. Leave and Pay structure under The Maternity Benefit Act, 1961:
   1. According to the Maternity Benefit Act female workers are entitled to a maximum of 26 weeks of maternity leave.
   2. In case of miscarriage or MTP (medical termination of pregnancy), a worker is entitled to 12 weeks of paid maternity leave.

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[17] Preamble to the Maternity Benefit (Amendment) Act, 1961 https://labour.gov.in/sites/default/files/TheMaternityBenefitAct1961.pdf

3. The prenatal leave is provided for eight weeks. Prenatal leave is leave that allows an employee time to care for their newly born or adopted child.
4. A woman with already two or more children is entitled to 12 weeks' maternity leave. The prenatal leave in this case remains six weeks.
5. A commissioning mother is also entitled to a 12-week leave from the date the child is handed over to her. A commissioning mother is defined as biological mother who uses her egg to create an embryo implanted in any other woman (i.e. the surrogate mother).[18]
6. The Act also provides for adoption leave of 12 weeks for a woman who adopts a child under the age of 3 months.[19]
7. The Act further requires an employer to inform a woman worker of her rights under the Act at the time of her appointment. The information must be given in writing and in electronic form (email).[20]

B. Leave and Pay Structure under other statutory provisions:
   1. Female civil servants are entitled to maternity leave for a period of 180 days for their first two live born children.[21]
   2. Under the National Food Security Act 2013, pregnant women and lactating mothers are entitled to receive maternity benefit of at least ₹ 6,000.[22]

Gratuity:

Gratuity means, "Something voluntarily given in return for a favor or especially a service."[23] In India it is regulated under the Payment of Gratuity Act, 1972. The Act provides for payment of gratuity at the rate of:

1. 15 days wages for each completed year of service subject to a maximum of ₹ 10 lakh in case of non-seasonal establishment.
2. 7 days wages for each season in case of seasonal employment.

"The Act does not affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer."[24]

A. When Gratuity is paid:

Gratuity shall be payable to an employee when [25]

1. He has rendered continuous service for not less than five years and
2. His employment is now terminated by virtue of:
   (a) his superannuation, or
   (b) his retirement, or
   (c) his resignation , or
   (d) On his death or disablement due to accident or disease.

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[18] The Maternity Benefit (Amendment) Act, 2017, 2017, Bill NO. 6 OF 2017, §2. 27th March, 2017.
[19] The Maternity Benefit (Amendment) Act, 2017, 2017, Bill NO. 6 OF 2017, §3(B). 27th March, 2017.
[20] The Maternity Benefit (Amendment) Act, 2017, Bill No. 6 OF 2017, §4. 27th March, 2017.
[21] The Central Civil Service (Leave) Rules 1972, §43
[22] The National Food Security Act 2013, §4
[23] Gratuity Definition, Black's Law Dictionary.
[24] The Payment of Gratuity Act, §1.
[25] The Payment of Gratuity Act, §4

B. How Gratuity is calculated:

Gratuity is calculated at 15 days wages last drawn by the employee for each completed year of service. The monthly wage is divided by 26 and multiplied by 15. In computing a completed year of service the period in excess of six months shall be taken as a full year.

Discretionary Benefits:

Employee Stock Option Plan:

Employee Stock Option Plan ("ESOP") is an employee benefit plan which is provided in lieu of bonus for good performance or sometimes in case of budding startups where paying huge salary is not feasible at the beginning, in lieu of paying less salary as compared to the market rate. ESOP works on the model where the company issues future shares to the employees at a predetermined rate. This share is vested in the employee for a fixed period of time. This is known as vesting period. It is basically a period after which the employee can use his stock option. When this vesting period is over the employee may choose either to buy the shares if the current market rate is higher than that was predetermined and sell it, thus making a profit or he may choose to not exercise this option if the market rate is lower than that was predetermined and wait for the rates to go up. This waiting period may be locked by the Company but even if the waiting period is over and the employee does not want to exercise his right, he cannot be obliged to do so.

ESOP only confers a right and does not create an obligation on the employees for purchase of shares.

Advantages of ESOP: The granting of ESOP has some major benefits:

1. The company don't have to pay large salaries and huge bonuses in liquid form.
2. The employee benefits only if the market rates of the company is higher at the time of vesting so he can earn profit. The rates can only be higher if the company is performing better and company can perform better only if the employee is working better. Thus this creates a mental incentive on the mind of the employee to work more productively and creates a win-win situation for both him and the company.
3. This creates ownership in the company for the employee which morally incentivize him and shall boost his work performance
4. Provides a tangible representation of how much their contribution is worth to the employer

Sweat Equity

"Sweat equity shares" means such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.[26]

[26] The Companies Act, §2(88)

Procedure of issue of Sweat Equity:[27]

1. The issuance of sweat equity shall be authorized by special resolution which means in:[28]
   1.1. A general meeting with 21 days prior notice to all the shareholders and
   1.2. By a 3/4th majority.
2. This special resolution shall be valid for twelve months from the date of passing of such resolution.[29]
3. The company shall not issue sweat equity shares if:
   3.1. It is more than 15% of the existing paid up equity share capital in a year or
   3.2. Such shares have a value of five crore, whichever is higher.[30]
4. The issuance of sweat equity shares in the Company shall not exceed twenty five percent, of the paid up equity capital of the Company at any time.[31]
5. The directors or the employees who have been allotted Sweat Equity cannot transfer it for a period of three years from the date of allotment.[32]
6. The sweat equity shares to be issued shall be valued at a price determined by a registered valuer as the fair price giving justification for such valuation.[33]

Employee Stock Purchase Scheme (ESPS):

ESPS is a mechanism by which a listed company issues shares to its employees at a discount. Shares are issued immediately and employee does not have to wait or have any vesting period. The shares which are issued a discount cannot be transferred by the employees for at least one year. In case of ESPS, each employee who is eligible must be specifically identified while obtaining the shareholder approval, unlike ESOPs, where shareholder approval is taken for the ESOP scheme in general.

What is a listed company?

A listed company "means a company which has any of its securities listed on any recognized stock exchange".[34] Following an amendment in 2021, following are excluded from the definition of the listed companies:[35]

A. Unlisted public or private companies which have listed their non-convertible debt securities or non-convertible redeemable preference shares or both.

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[27] Companies (Share Capital and Debentures) Rules, 2014, Rule 8
[28] Companies (Share Capital and Debentures) Rules, 2014, Rule 8(1)
[29] Companies (Share Capital and Debentures) Rules, 2014, Rule 8(3)
[30] Companies (Share Capital and Debentures) Rules, 2014, Rule 8(4)
[31] Companies (Share Capital and Debentures) Rules, 2014, Proviso to Rule 8(4)
[32] Companies (Share Capital and Debentures) Rules, 2014, Rule 8(5)
[33] Companies (Share Capital and Debentures) Rules, 2014, Rule 8(7)
[34] The Companies Act, 2013,§2(52)
[35] The Companies (Specification of definitions details) Second Amendment Rules, 2021.

B. Public companies whose equity shares are exclusively listed on a stock exchange.

Conclusion:

In a global economic forum the yardstick of employee benefits and executive compensation has direct bearing on an organizations productivity and a nation's economic growth. Employees and executives are core assets or human resources who provide their manpower, skills, brains and management to ensure sustainable productivity and profitability of the organization.

To attract the best employees and executives a greater need is felt by the economy planners and the company management boosted the employee benefits and attractive package of compensations for the executives at par the international standards. This was primarily done to contain brain drain and executive poaching. Therefore besides the salary of the employee, the organizations started providing benefits in kind that include various non-wage compensations. By offering these attractive benefits to the employees to increase the economic security of staff members the organization also improved workers retention across the organization because such benefits also improved employee's loyalty and increase job satisfaction as schemes like ESOP creates an ownership in the shares of the company.

In a global scenario there is greater mobility and freedom to the skilled employees and hence talented executives can leave a company and move to another one with better perks. To maintain stability in the organization and discouraging this trend, the employee benefits scheme has played a pivotal role.

And at last but not least, India is governed by its Constitution. And the Constitution mandates India to be a socialist country. Thus providing statutory benefits to all the working class in the country is statutory obligation on the part of the government. Through such benefits it not only fulfills its duty towards the citizen but also improve the lifestyle of the employees which in turn will boost the nation's economy as it shall boost both the productivity as well as purchase capacity of the working class. Only thing which the government must now focus on is the on-ground implementation of these schemes which still eludes many workers due lack of knowledge and wide corruption. With emergences of digitalization of various schemes and robust awareness campaigns, slowly, this shall also be achieved.

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INTERNET COOKIES AND BREACH OF PRIVACY

Harshvardhan*

Abstract: Suppose you went to a shopping mall and start window shopping. When you come back to one of the stores you have visited earlier that day, you found that one of the sales representatives remembers your choices and gives you a customized shopping experience. Wouldn't you be happy with that salesperson? All of us will be. But imagine the same salesperson accompanying you at all the stores you go to and then give you a customized experience. All of us will freak out. This is what cookies do to you when browsing over the internet looking for a shirt or exploring a hair salon. And we have both types of cookies, one that remembers your choice and the other that starts stalking wherever you go. So let's understand how cookies aren't that good for your privacy on the webspace.
Keywords: Privacy, Cookies, Internet.

Introduction:

Cookies are files saved on a computer or mobile phone when you first visit a website. These are text files saved in your device, designed to give you a customized experience when you visit that website the next time. Cookies are beneficial in creating a user-friendly experience and making internet surfing smooth. It's because cookies that add an item to your virtual cart while shopping online remain there even if you click another link on the same website.[1]

Internet Cookies:

In simple words, imagine you go to a store wherein every customer going there is tagged with a unique symbol, and the store maintains a database of symbols assigned to every customer. With every symbol, there is a note mentioning your shopping experience and your choices. So the next time you visit, the salesperson will see your unique symbol and then give you a customized experience.

A similar thing happens in the case of cookies. Cookies are created when you visit a new website, and the website server sends the user's browsing pattern to your internet browser. And your browser subsequently saves the data locally into your phone or computer hardware. Like the shopping mall, when you revisit the website, the browser sends back the stored data to the website server and gets a customized experience.

Cookies are beneficial both for internet users and websites. They help customers by showing them more options based on their line of thought, which helps people make the right decision without wasting their time. Lou Montulli, the brainchild behind the development of cookies, has shaped present-day internet surfing with his remarkable invention. But over time, people have begun to see the leeward side to it in the midst of rising concern for privacy among netizens and people in general.

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[1] https://www.ftc.gov/site-information/privacy-policy/internet-cookies

Types of Cookies:

Session Cookies- Least invasive among internet cookies. They are only retained for one session and deleted once you leave the website. E-commerce websites primarily use them.

Permanent Cookies- These cookies keep your information even after leaving the website. They are used mainly by websites to remember the login id and password.

Third-Party Cookies- The breach of privacy begins here. Third-Party Cookies use data collected from a website and use it to do the consumers' behavioral analysis. Digital Marketing Agencies use these cookies for targeting the audience based on their age bracket, location, etc.

Flash Cookies- These cookies are a real threat to an individual's privacy on the internet. One of the most significant threats is the fact that these cookies can't be deleted. Even if you have cleared the cookies from your device, they manage to remain in your hardware.

Zombie Cookies- These cookies have the ability to regenerate themselves after deletion. They can re-create themselves, and it's a pretty uphill task to get rid of Zombie Cookies. They are an advanced version of Flash Cookies.

The proponents of online marketing and websites owner justify the use by highlighting only the brighter side of cookies. And it is perfectly fine to showcase only the bright side of your services as long as the concealed side has no detrimental effect on an individual's fundamental right to privacy (as per Supreme Court judgment in Justice K.S.Puttaswamy(Retd.) v. Union Of India).

Legal Perspective and Statutory Provisions:

Zechariah Chafee, a noted legal philosopher, wrote in an article titled "Freedom of Speech in War Time" that "Your right to swing your arms ends just where the other man's nose begins." This is what applies to internet cookies using websites, gaming companies, e-commerce companies, etc. The right to do behavioral analysis through cookies must be done within the ambit of a legal provision.

India doesn't have a dedicated law for Data Protection and privacy. Although different laws protect an individual's privacy through a mixed legislative process. Some of the laws in this regard are-

The (Indian) Information Technology Act, 2000[2] has few provisions which deal with a penalty in cases of breach of privacy and misuse of personal data.

Section 43A- This section provides the ways for compensation in case of passing off sensitive personal data or information in a computer resource. But the problem with this section is the fact that it only talks about sensitive personal data. The moot question still lies, "Why only sensitive data?". Why there shall be a cap on my right to privacy?

Another section in The IT Act, 2000 is Section 69B, which gives the central government the authority to monitor and collect traffic data or cybersecurity information. But the accountability is way too vague and not clearly laid out so that an individual can question the state's authority to collect personal data.

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[2] IT Act, 2000- https://www.indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf

The Indian Contract Act, 1872[3] also comes into the picture wherein an intermediary or a service provider discloses personal information accessed in the course of providing service. Section 72A of The IT Act, 2000 has provisions for penalizing such offenses.

But privacy has a much broader meaning on the internet, and unfortunately, we don't have any legal remedy for minor intrusions in our privacy. According to Statista's report[4] on the number of internet users in India in 2020, it's a whopping 700 million that is all set to touch 974 million by 2025. And yet, with such shallow legal remedies available for 700 million people, privacy breach with Cookies is freely and readily done by companies with little or no check by the state.

Judicial Approach:

Google's Case[5]:

In a class-action lawsuit filed against Google Inc, the company was accused of bypassing the Safari Browser of Apple's computer, designed to block "third-party cookies."Researchers alleged to Google that it had inserted a code that bypassed Safari's cookie-blocking feature. Google had to enter into a $5.5 million settlement, which a federal court later rejected. This case is a classic example of the extent to which one of the most reliable companies in the world can go, which may even lead to a blatant breach of privacy.

Facebook's Case[6]:

Facebook, the world's biggest social media platform, has been repeatedly accused of breaching its users' privacy. In 2016, the Belgian Privacy Commission initiated a case against Facebook for tracking non-users through the use of cookies. Facebook was tracking even those who haven't logged in to their accounts and non-users. Anyone visiting Facebook's page was tracked all along with his web browsing. Facebook used "Tracking Cookies," which used Facebook's "like" button on different websites. Once a user clicked on the "like" button, Facebook started tracking them, and there was no possible option to get rid of the cookies which get downloaded in your hardware the moment you clicked the "like" button.

The cases mentioned above are not even the tip of the iceberg, and there is no possible way to track every case of breach of privacy. Technology companies will always find a way out; the best possible solution is to have a "Rock-Solid" legislation strictly setting the liability for privacy breach.

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[3] Indian Contract Act, 1872- https://www.indiacode.nic.in/bitstream/123456789/2187/1/A1872-9.pdf
[4] https://www.statista.com/statistics/255146/number-of-internet-users-in-india/
[5] https://www2.ca3.uscourts.gov/opinarch/171480p.pdf
[6] https://jolt.law.harvard.edu/digest/belgian-court-of-appeals-reverses-order-prohibiting-facebook-from-tracking-non-users

Comparative Analysis:

As per UNCTAD[7](United Nations Conference on Trade and Development) website, 66% of countries now have legislation on Data Protection. In comparison, 10% of countries have draft legislation in place, 19% of countries have no legislation, and there are 5% of countries with no data. So we can say that governments worldwide are at least trying to make a sincere effort in the backdrop of rising debate on an individual's right to privacy.

In Data Protection, Europe has emerged as a leader, with 96% of European countries now have Data Protection laws.

Europe-European Data Protection Board has developed a new set of changes in the Standard Contractual Clauses (SCCs) to make it compatible with the General Data Protection Regulation (GDPR). These laws protect the transfer of sensitive information from areas outside the European Economic Area(EEA).
China-China's Personal Information Protection Law has taken a comprehensive approach that gives an individual right to his/her personal data. The right to deletion, withdrawal of consent is a few important highlights of the new laws, which are up for public comments.
Singapore-The latest amendment to the data protection laws has widened the ambit of rights exercised by individuals over their personal data. Compliance has been made more stringent with a heavy penalty in cases of non-compliance; the consent clause is amended to widen the scope and applicability of data protection laws.
India-India has also come up with The Personal Data Protection Bill, 2019, which has made considerable changes. Under Section 57(2) of the bill, the penalty provision is hefty, which has been kept at Rs15 crore or 4% of the "total worldwide revenue" of the data fiduciary. Another important provision is the definition of sensitive data under Section 3(36), which has a wide array of personal data from Financial Data to Sexual Orientation and health data to religious or political affiliations.

Conclusion:

Different countries are coming up with different sets of data protection laws. Still, the lack of uniformity under a global framework is one of the biggest loopholes exploited by tech giants. The use of cookies using data to augment the availability of choices is always a welcome step. Still, unabated monitoring of personal spaces is in direct contravention of a series of legislation to protect an individual's privacy. Cookies are the tip of the iceberg, and the monitoring by state and private entities is happening overtly in one way or the other.

Rising public concern coupled with a focussed approach on digital literacy can make a substantial difference. The behavioral shift is the need of the hour, and there is no room for any other negligence. The advent of 5G will generate an unprecedented database. If the laws aren't made in coherence with the evolving technology, billions of people's privacy will be at stake.

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[7] Data Protection and Privacy Legislation Worldwide- https://unctad.org/page/data-protection-and-privacy-legislation-worldwide

DOMESTIC VIOLENCE: AN ILLEGAL VANGEANCE TO SUPRESS THE WOMEN AT LARGE

Subham Pandey*

"Domestic violence is the front line of the war against women".
-Pearl Cleage

Abstract: India is the country of rich heritage by having been called as the country of discipline, rich values, religious sentiments and the pride of motherhood, but what the practical scene or the situation is that, the *Women* are being exposed to *Cruelties, Atrocities, Tortures* by their respective husbands and their co-belongings including husband's laws and other relatives. The question is irrespective of having prominent laws in *India* namely the *Domestic Violence Act, 2005*, why still the women are facing the gruesome effects/consequences of *men's frustration*. The *Researcher* has genuinely put an effort in this *Research Article* in order to highlight the impacts of *Domestic Violence* on the *women's* mindset, and the legal preventions for curbing/suppressing the illicit and immoral act of *Domestic Violence*.

Keywords: Domestic Violence, Women, Motherhood, Cruelty, Abuses.

Introduction:

The women's community are not just being vanished due to the abovementioned two causes actively being committed by the male genders but also includes the act of domestic violence which may be done in order to suppress, reduce the women's ethnicity and dignity, the dominance being imposed by their respective life partners in order to cause duress, depression, fatal injuries in some cases, throwing of objects, intimidate, forms the terror on her part, frightened situation, humiliate, blame, condemn her at the public places, some absurd exchanges of words which may amount to the vulgarity of the male towards her partner amount to the gross meaning of domestic violence at large.[1] The factors which cause the gruesome effect of domestic violence by the male masses include physical abuse, psychological factor, economic and financial factors, violence which amounts to the sexual abuse and marital rape also comes under the ambit of domestic violence, emotional abuse.[2]

'The Domestic Violence': The Harsh Evidence of the Brutal Mankind

The marriage is the best form of union between the *Husband* and the *Wife*, as under the *Hindu Law*, there is a process of *'Saptpadi'* which is an indispensable part of the *'Hindu Marital Ceremonies'* where the *Bride and Groom* takes a round before a fire by promising each other to save them in difficulty. The husband is not getting the absolute authority or licence to ill-treat her wife by making inflicting pain and cruelty through *Physical Abuses*. Moreover, the *Domestic Violence* is nothing but an *'Suppression of Dominance'* done by the *'Husband towards her Wife'* for no reasonable causes. The elongation of these violations

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[1]https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2784629/.

[2]Ibid.

spreaded so long that the Indian Judiciary had to come in between the rigorous matters of *Domestic Violences* under *Indian Subcontinent* to finally formulate the *Domestic Violence Act, 2005* to curb these extreme victimizations and suppressions which *Women Masses* been tolerating for so loner period of time.[3]

The 'Domestic Violence' under 'the Protection of Women from Domestic Violence Act, 2005':

The legislature has been very much superior and flexible in order to intervene between the wrongs being committed on the part of the women's dignity and masses at large, and thereby it has also been referred to as the *'Parent Authority'* to formulate and make law, since the atrocities were relatively in the higher context against the women community at large, so legislation in 2005 has made law on *'The Protection of Women from Domestic Violence Act, 2005'* which has constructively reduced the women atrocities being committed by the male's gender in the greatest possible manner. Following are some of the provisions which talk about the reduction of women's atrocities and have given some of the legal measures to combat the offense of *'The Domestic Violence'*.

- Under *'Section 5 of the Protection of Women from Domestic Violence Act, 2005'* there has been the express provision that the police officer, service providers, and the magistrate if receives the complaint by the complainant or victim then there shall be the duty of them to inform about the victims regarding the rights of them i.e. to make an order from the Court in relation to the compensation order which has to be provided by the wrongdoer to them.[4]
- Under *'Section 12 of the same Act'* expressly provides the provision that the aggrieved party can give application to the Magistrate to pray for more than one relief if it is being reasonable and fair to demand from the Magistrate.[5]
- Under *'Section 22 of the same Act'* expressly provides the provision of the compensation order which if the Court orders, then the respondent has to give compensation to the aggrieved instead of the loss sustained by the aggrieved due to the domestic violence being caused by the respondent.[6]
- Under *'Section 31 of the same Act'* expressly provides the provision of penalties as if any protection order given by the Court on part of aggrieved person to the respondent being further contravened or violated has to undergo the imprisonment which may extend to one year or with fine which may extend to twenty thousand rupees or with both.[7]

Role of International Conventions and various Social Organizations in order to Combat 'Domestic Violence':

The purity and protection of women at large shall be the indispensable task or duty of several states under domestic and international law, along with the national cooperation there is the wider amalgamation of some international

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[3]https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1840628.
[4]http://www.bareactslive.com/ACA/ACT169.HTM.
[5]Ibid.
[6]Ibid.
[7]Ibid.

conventions which optimistically reduces and minimizes the harmful and brutal tortures being sustained on the women's community at large, following are some of the highlights of the international conventions which protects the women's modesty at large, they are:

- *The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* which has formulated and entered into force in *1981* prohibits the violence against women or domestic violence, their main primary focus is to make all States agreed to condemn discrimination against women in all of its forms. The above-mentioned convention's recommendation *19* expressly states that violence against a woman is the violence of their civil rights and also states to suppress the negative effects of cruelty, torture by males and other inhumane acts.
- *The Universal Declaration of Human Rights, 1948* mentions some of the core principles and legal provisions that protect the human rights in the greater masses which effectively prevents the illicit tortures and other aggressive acts being committed by the male members against the women at large.
- *The United Nations Declaration on the Elimination of Violence against Women, 1993* also provides the legal safeguards to prevent and protect the entire women's masses or the community to be get suffered from any sort of criminal or physical violence done by the males at large.
- *UNICEF'S* core initiative towards women development has not at all been concealed from the public at large, there are many comprehensive and social initiatives been taken up by *UNICEF* to curb and prevent the domestic violence on the part of the women in a best, efficient and positive manner.

Case Analysis on Domestic Violence:

In the case namely *Savita Bhanot v. Lt. Col. V.D.*[8], the *Principal Family Court* held that the petition filed by the *Plaintiff* against the *Respondent* for the *Commission of the Domestic Violence* is even maintainable, before the commencement of the *Domestic Violence Act, 2005* came into force. The rationale behind this order was to deter the respondent for his wrongful intention of causing harm to the female spouse of him without any reasonable cause. Moreover, the *Courts* presumes that if any action not be taken against the *Respondent* on that specific point of time when the offence committed, then there shall be no benefit of giving or providing the *Penalty Provisions* for committing the gruesome or illicit act of *Domestic Violence*.

In the leading case, the *Hon'ble Court* has clearly held that the *'Physical Atrocities'* being committed against the *'Female'* shall not at all be allowed at any cost, and the harsh or stringent actions shall be taken against the *'Respondent'*.[9] The rationale behind the order is that *Women* are being symbolised as the *'Respect of Token'* in our *Indian Culture*, so marriage itself does not give the absolute licence

[8]22nd March, 2010.

[9]https://www.yourarticlelibrary.com/essay/domestic-violence-in-india-and-constitutional-provision-for-it/24985.

to any husband to ill-treat her wife for no apt or fair causes or without any due causes treats them in an inhumane manner.

In the leading case, the *Hon'ble Court* has widely interpreted the illicit facets of *Domestic Violence* in such a way that it also includes the forcibly asking/demanding of *Dowry* from the *Bride's Family* by the *Groom's Family*, and the *Court* presumes that if due to *Dowry Situations* any *Wife or the Female Spouse* commits suicide or the *Groom's* family incited the *Bride* to commit suicide, then it shall also be treated under the *Illicit Facets of Domestic Violence* and the *Respondent* shall be made punishable for that offence respectively.[10]

The Effects and Consequences of Domestic Violence and their Criticisms:

- The society is what we known to be called as the *Mirror of Real Facets of Life*, so, therefore, if the society is having the zero movement or they possessing inactive step for stopping the illicit facets of *Domestic Violence*, then how can be the *Women Masses* at large be in the safe zone. The sabotages of through the commission of *Domestic Violence* not only poses the real threats over the *Women's Self Confidence* or their dignity but also tarnishes the *Mental Character and Social Status* of them on the large scale.[11]
- The regular illicit practices of the *Domestic Violence* amounts to the loss of sleeping tendencies in *Women, Hypertension and Depression* going to be the most prevalent among *Women* and moreover, it causes *Anxiety Issues or Symptoms* which may lead to the *'Slow Killing Practices'* for the *Women Masses* at large.[12]
- The illicit infliction of *Domestic Violence* results into the addiction of high forms of intoxication including drugs, alcohol, morphine's and other harmful drugs which the *Women* starts taking or consuming in order to deviate their respective pains or sufferings of *Domestic Violence*.[13]
- The illicit and immoral effects of the *Domestic Violence* led to the family breakups and loss of positive family environment which may disrupts the *Child Atmosphere* also who are living in the home with their parents, and moreover, it results into the lots of health issues and bodily ailments of the *Women Masses* on the brutal scale.[14]

The irony of this *Act* is as much there on the other side, as every coin has two sides, similarly every Act is having a *Pros and Cons*. As, this *Act* is very much needed for the fair and equitable justice for *Women* masses at large, but this *Act* simultaneously dilutes in terms of some of its provisions as it neglects the petition filed by the *Women as Respondent* in such a way that *Judges* do not pay heed on delivering fair judgement in favour of *Women* for the gross victimization of *Domestic Violence* as due to in most of the cases Women have no evidence for the commission of *Domestic Violence's* which committed by their respective husbands on the brutal and larger scale.[15]

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[10]Ibid.
[11]Ibid.
[12]Ibid.
[13]https://www.facs.nsw.gov.au/domestic-violence/about/effects-of-dv.
[14]Ibid.
[15]Supra Note 9.

Role of Active Legal Agencies and other Social Development Centre in Minimizing the Social Evil of Domestic Violence:

The *Domestic Violence* is the abrupt atrocity being committed by the husbands towards their respective wives in order to dominate them or creating or imposing a criminal force over them in order to cause them pain in form of either *Mental Abuses or the Physical Abuses*. Therefore, the rate of such offences has to be prevented by some *Social Development Centres, Women NGO'S, other Legal Institutions* so that the issue can be perfectly minimised without further more suffering being suffered or tolerated on the part of the entire vicinities of the *Women Gender* at large. The health basically gets deteriorated of *Women* during the continuous practice of *Domestic Violence* committed or inflicted by the husbands and therefore, it is the most indispensable for the different *Social Centres, Health Agencies* of the various *Governments and Private Institutions, Women NGOs, and other Women Personnel Departments* to cure them or rather to provide them with the just and fair counselling so that they can nurture them in a best, sound, effective and efficient manner.[16] The problems of the *Domestic Violence* is indeed the biggest threat to the entire *Women* vicinity. We say after marriage *Women* gets a second-best home for its lifetime survival, but it is very difficult to digest this saying as only after marriage as the treatment they receive from their respective husband makes them so isolated and less safe in the second home, as in most of the cases these *'Slow Killing Tactics'* i.e., the *'Curse of Domestic Violence'* provides them with the *'Slow Death'* and their life becomes highly dreadful.

Women are not anyone's Private Property:

Since from the ancient time, we referred *Women* as the *'Ardhagini'* of his *Husband*, but what is the current and practical situation, as we able to see is the meaning of the abovementioned word has changed constantly down to the worst spectrum. The Wife today has become the property of their *Husband* as, whenever the husband thinks feasible to ill-treat her wife, beat her wife, start yelling her wife and so on with other dreadful appearances. The current law says that *Wife* is indeed not being the private property of their *Husband*, though *Marriage* is the best union between the *Husband and the Wife*, where lots of cultural, social, emotional values and bonding gets connected, but most of the husbands in *India* thinks as they got the licence or an absolute licence to treat in whichever manner they want to treat they can, and just after by considering these above factors, the Indian Legislature has drafted or formulated the *Domestic Violence Act, 2005*, for curbing this social menace. The era has come now to bring up a revolution against the dreadful husband for immediately stopping this violence of *Domestic Violence*.[17] The measures, remedies, redressals have to be mend in a positive way for the entire *Women's Vicinities* so that justice has to be dispensed on their respective part without making any further unreasonable delays.[18]

The *Hon'ble Courts* though in some of the cases easily releases the respondents and through this order, the *Respondents* are aggrieved a lot, but in

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[16]https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2784629/.
[17]Ibid.
[18]Ibid.

most of the cases if *Respondent* is claiming that herself suffered or if she would have been inflicted with the brutal pain of *Domestic Violence* with having the conclusive evidence and other proofs, then the *Hon'ble Courts* do fairly dispense with the apt, just and an equitable judgement.[19]

Moreover, the different legal institutions have to be deal with these serious issues, when in some cases *Courts* might delivers the wrong judgement, then also these *Institutions* has not to give up, and simultaneously help the aggrieved respondents by seeking effective, expeditious and fair justice.[20]

Conclusion:

The transition from the illiterate to the literate phase among the women's community at large has undoubtedly made them conscious about their rights and duties, and simultaneously on the other side gave them enough freedom to take any action against the wrongdoers. The period of ancient time was the sole eye witness that how the women's masses or the gender at large got into the sufferance on so many issues, problems, offenses been faced by them, but there is been indeed the positive changes which have been seen within a couple of years in relation to the *'Fair Judiciary System', 'The Making of the Fast Track Courts in India', 'The Effective Legislative System and Machinery', 'Several Other Social Organisations and the Constructive Amalgamation of International Conventions'* has suppressed the illicit behaviours and acts which condemn and reduces the women's dignity and modesty at large. The women's if being furtherly more educated and being imparted vocational training at different States or if Government makes some effective awareness centers and dynamic provisions for the women's gender at large will protect their standards of life and also prevents them from the different atrocities being sustained on her part. In another aspect, there shall have to be the strict and rigid penal provisions for the wrongdoers or the heinous offenders who think women as to be the catapult or the movable assets whom they can treat in any way they want. The society has to become more vigilant, practical and the ancient thinking that women cannot make our country proud in any of the field has to be curtailed and be stopped because it's the society only who can transform these unethical practices and superstitious believes been formed on the part of male's masses and other people who exist in the Indian Subcontinent in order to protect the dignity and integrity of our motherland.

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[19]Ibid.
[20]Ibid.

Notes and Comments

JUSTICE K.S. PUTTASWAMY *v.* UNION OF INDIA, [(2017) 10 SCC 1]
(Right to Privacy Case)

Gursheen Kaur*

Facts:

- A Bench of 9 Judges was constituted to look into the question of right to privacy as a constitutionally protected right arising out of a matter with a 3-Judges Bench of Supreme Court to look into the scheme of Aadhar propounded by GoI.
- The said scheme was propounded to collect and compile both demographic and biometric data of residents of the country to be used for various purposes.
- The matter was taken up by the court through the mechanism of writ petition filed by Hon. J. K.S Puttaswamy (Retd.) wherein the said scheme was challenged on the ground of violation of Right to Privacy.
- The matter posed a challenge for constitutional interpretation (on the basis of institutional integrity and judicial discipline) for the provisions of Part III of the Indian Constitution as there was an ambiguity and predicament created due to various Judicial Precedents on Right to Privacy as a constitutionally protected Fundamental Right.

Legal Issue:

- Whether Right to Privacy can be claimed to be a constitutionally protected Fundamental Right under Part III of the Indian Constitution?
- If yes, whether this right is to be construed as right in *Isolated Silos* or it is to be interpreted to be covered under the existing Fundamental Rights?
- Whether the decisions recorded by this court in M.P Sharma v. Satish Chandra and Kharak Singh v. State of U.P. that there is no such fundamental right to privacy, is the correct Constitutional Interpretation?

Observations:

- The honourable court has looked into the matter by determining meaning of privacy from 5 aspects including:
  (1.) Whether there is constitutionally protected right to privacy?
  (2.) if there is constitutionally protected right, whether it is of independent character or it arises from within existing guarantees of protected rights?
  (3.) Doctrinal foundation for claim to privacy.
  (4.) Contents of privacy
  (5.) The nature of regulatory power of state.
- In M.P. Sharma vs Satish Chandra (8 Judges Bench case), an investigation was ordered by the union government on allegation of conciliation and embezzlement of funds by the petitioner company when it went into liquidation. When search warrants were issued and records were seized, the said action was challenged on ground of violation of FR U/A 19 (1)(f) and A.20(3).

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- The above contention was rejected by on the ground that A.20 (3) was not violated by process of search or seizure as search warrant is addressed to police officer and notthe party concerned and therefore the party concerned is made to submit to acts of another and not his testimonial acts. (Not fit for interpreting right to privacy as FR)
- In Kharak Singh v. The State of U.P. (6 Judges Bench case) wherein the petitioner was challaned for dacoity and was released for want of evidence, but the police compiled History Sheet (as defined in Regulation 228 of chapter XX of U.P police Regulation) to keep the petitioner under regular monitoring and surveillance. This was challenged by petitioner U/A.19(1)(d) as being restrictive of his movements.
- This contention was rejected as court interpreted that by a midnight knock on the door, the locomotive was not impeded in any manner. Nevertheless, Court held clause (b) of regulation 236 which is Domiciliary Visits as violative of A.21(reliance on doctrine- *"every man's house is his own castle"*.)
- Both the judgement of M.P Sharma and Kharak Singh were propounded on the principles of A.K Gopalan v. State of Madras wherein the Court held the doctrine- *Fundamental Rights as Isolated Silos* was propounded i.e. each provision of the Fundamental Rights to be construed as embodying a distinct protection.
- This theory of fundamental rights being in water-tight compartments was later on overruled by decision of Cooper v. UOI (11 judge bench case) and doctrine of Maneka Gandhi v. UOI, wherein Fundamental Rights were held to be of over lapping nature especially with reference to personal liberty U/A.19 and A.21.
- From the year 1975 to 1997, this court has in various decisions including PUCL v. UOI held Right to privacy to be a constitutionally protected fundamental right.

Hence this matter.

- The court while observing the matter has looked into the Origins of Privacy by referring to jurisprudential meaning of privacy as given by scholars like Aristotle, who created a distinction between public sphere of political affairs (polis) and personal sphere of human affairs (oikos) and William Blackstone who spoke about the distinction between private wrongs and public wrongs.
  Austin has also spoken about the distinction between public and private realms: *jus publicum & jus privatum.* John Mill has also talked about the need to preserve a zone within which liberty of citizen should be free from authority of state.
  An implied reference for right to privacy can be traced back to 1890 wherein Samuel D warren & Louis Brandeis adverted to evolution of law in their article published in Harvard Law Review, to interpret right to life as to mean – "right to be let alone".
  These observations of Warren & Brandeis have a continued relevance today in globalized world dominated by IT. As societies have evolved, so as the connotations and ambit of Privacy.
- Privacy has been observed as a concomitant of the right of individual to exercise control over his personality and has been traced as a natural right, thus being inalienable from human personality.
- Evolution of doctrine of Right to privacy in India can be traced back to various judicial decisions over a period more than four decades including telephone

tapping in (PUCL), inspection of confidential documents in a banker- customer relationship (Canara Bank), disclosure of HIV status (X v. Hospital Z) and rights of transgender (NALSA).

- Though Indian Constitution is silent on the aspect of Right to privacy as Fundamental Right, nevertheless it has been associated with Right to Dignity as enshrined as a value in preamble and upheld under A.21 as right to live a dignified life.
- Indian constitutional jurisprudence has recognised an inseparable relationship between protection of life and liberty with dignity and has considered dignity as an integral part of Fundamental Rights & DPSP as guaranteed through A.14, A.19, A.21, A.41& A.42(Bandhua Mukti Morcha v. UOI & M. Nagraj v. UOI).
- Dignity is observed as the core which unites fundamental rights and privacy assures dignity to the individual and it is only when life can be enjoyed with dignity, liberty can be of true sense and all three liberty, dignity & privacy are intertwined to achieve protection of life. All the fundamental rights have been held to be a part of basic structure & thus inalienable as held by various landmark judgements.
- Indian Constitution, as considered supreme law of land is a living document and has been interpreted time and again to suit to the dynamic society in order to secure justice, liberty and dignity to all its citizens. This can be observed by looking into constitutional development of A.21 to include right to livelihood, right to legal aid and right to live a dignified life with personal liberty.
- Recognition of privacy as a fundamental constitutional value is a part of India's commitment to global human rights regime. A.51 of the constitution, A.12 of UDHR, A.17 of ICCPR, S.2 (1)(d) & S.12(f) of Protection of Human Rights Act all recognises Right to Privacy as Constitutional Right either expressly or impliedly.
- The position in law is well settled, if there is a conflict between international law and domestic law, the court would give effect to latter but there is no such contradiction in present case. Thus, India must adhere with the global standards of practice.
- Though the doctrine of privacy was originally absent in common law, it developed in 19th century to recognise privacy as a principle of general value and there has been a shift in approach for privacy from being "*Invasion of Privacy*" to "*Identification of Privacy*" over a period of time through judicial precedents.
- The US constitution though does not contain an express right to privacy, nonetheless the same has been recognised through various precedents and an amendment to the constitution has been made with that regard with a restriction of privacy test.
- The South African constitution expressly recognises right to privacy under S. 14 of Bill of Rights. Whereas the Canadian constitution does not have express provision for right to privacy as FR but the Canadian Charter has been interpreted by Canadian SC to recognise right to privacy through various judgements.
- In Europe, right to privacy has been recognised under ECHR (A.8) & CFREU.

- Alan Westin has described privacy as being categorised in 4 states namely a) state of inner dialogue, b) state of intimacy, c) state of anonymity, d) state of reservation.
- Roger Clarke has also developed classification of privacy on Maslow's Pyramid and categorised them as bodily privacy, privacy of personal behaviour, privacy of personal communications and privacy of personal data.
- Though founding fathers of our constitution have rejected the notion of right to privacy as a fundamental right but a close scrutiny of CAD indicates that assembly only considered whether there should be an express provision guaranteeing right to privacy as fundamental right. Dimensions of right to privacy are much larger and were not fully examined. It would be injustice to draftsmen as well as the document they sanctified to construct its interpretation to an originalist interpretation and not like a living document.
- The submission that right to privacy is an elitist construct and the poor needs no civil and political right as right to privacy was outrightly rejected by the court stating civil and political rights and socio-economic rights to be observed as complementary to each other and not mutually exclusive.
- An intrinsic relationship between development and freedom was observed by the court and it was held that strength of Indian constitution lies in the foundation provided by constitution to liberty and freedom and privacy which has both positive and negative content was held to be a core feature of life, personal liberty and freedom guaranteed by part III. Any curtailment or deprivation would have to take place under procedure established by law, which must be just, fair & reasonable.
- Privacy was not couched as an independent Fundamental Right but true nature of privacy and its relationship with Fundamental Rights was protected. It is important to note that this right has not been held as an absolute right and it comes with a privacy test i.e. test of reasonable restriction and proportionality which has to be adjudged and identified on case to case basis.
- Right to privacy as a fundamental right has been recognised as citizen guaranteed fundamental right.
- Privacy was founded to have been analysed subjected to references in ancient and religious texts of India. The Arthashastra prohibits entry into another's house without the owner's consent. There is still a denomination named, *Ramanuj Sampradaya*, members of which continue to observe the practice of not eating and drinking in presence of someone else. In Islam, peeping into other's houses is strictly prohibited. In Christianity, confession of one's sins is a private act.
- Privacy is also held essential for exercise of freedom of conscience and right to profess, practice and propagate religion vide A.25.
- One more test which has highlighted for privacy was considering the opposite, like justice is construed as absence of injustice, and freedom as absence of restraint. Privacy may be understood as antonym of publicity.
- Informational privacy as a facet of privacy in this digital era with robust regime for data protection comes with certain new challenges which can be originated from state as well as non-state entities. Thus, a careful balance between individual interests and legitimate concerns of the state has to be sought by exercising the right in conformity with privacy principles.

Order of the Court:

The reference is disposed of as-

- Decision in M.P Sharma which holds that the right to privacy is not protected by the constitution stands over-ruled.
- Decision in Kharak Singh to the extent that it holds that the right to privacy is not protected by the constitution stands over-ruled.
- The right to privacy is protected as an intrinsic part of the right to life and personal liberty under A.21 and as a part of freedom guaranteed by Part III of the constitution

Conclusion:

Privacy is a concept which does not have any specific meaning attached to it and the expression is inchoate. An individual's decision to make his life visible out to the world is a product of his private choice and there should be no scope for any other individual to interfere with such autonomy.an individual may perceive that the best form of expression is solitude and silence.

Granting special status to privacy can be detrimental to women in the Indian society which is pre dominantly patriarchal in its character as it can be used to shield them, control them or silence them. As a result, it inflicts violence on the victim twice- the physical as well as the mental trauma. Law with this respect must be made with reasonable apprehensions.

Information technology together with easy access to internet and the social media has rapidly altered the course of life in the last decade. With an accessibility to online purchase, online trading, online books, individuals have been exposed with the threat to privacy in digital era as they leave electronic tracks without their knowledge on every site. To sum up, they disclose their nature of personality, preferences, language, health, hobbies in the form of cookies which can allow browsers access to unique identified number and secure all the data. This data processing and data mining has been a million project in this global era and Companies are readily investing in Data Processing.

All of this in aggregation makes apparent that Right to Privacy is more of a bane than a boon if looked through realms of life. Though this would be an incorrect conclusion to draw, as every right comes with its own protection and restrictions. This right has been the need of hour since last decade and therefore one should exercise the right by adhering to privacy principles.

The balance between data regulation and individual privacy has to be achieved with strong data protection laws which can be reviewing international practices like –

-Notice by data controller to all individuals of its information practices.

-Option to be given to individual for allowing / disallowing dissemination of his data.

-Only relevant information must be collected by the data controller & such information must not be shared with other data processing enterprises without a proper notice to individual with respect to the same.

It is necessary to acknowledge that individuals live in communities and work in communities and therefore, the path must be left open for succeeding generations to meet the challenges of privacy that may be unknown today.

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